FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1981 TO DECEMBER 31, 1981

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MEMBERS OF THE FEDERAL TRADE COMMISSION AS OF DECEMBER 31, 1981

JAMES C. MILLER III, *Chairman*
Took oath of office September 30, 1981

PAUL RAND DIXON, *Commissioner*[1]
Took oath of office March 21, 1961

DAVID A. CLANTON, *Commissioner*
Took oath of office August 26, 1976

MICHAEL PERTSCHUK, *Commissioner*
Took oath of office April 21, 1977

PATRICIA P. BAILEY, *Commissioner*
Took oath of office October 29, 1979

CAROL M. THOMAS, *Secretary*
Appointed June 20, 1977

[1]Retired September 25, 1981.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

EQUIFAX INC. (FORMERLY RETAIL CREDIT CO.)

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8920. Final Order, July 7, 1978—Dismissal Order, July 14, 1981*

On remand from the U.S. Court of Appeals, Ninth Circuit, this order dismisses the March 9, 1978 complaint against a collector and seller of consumer credit information. The Commission concluded that further proceedings would not be in the public interest.

Appearances

For the Commission: *Joseph S. Brownman.*

For the respondent: *J. Wallace Adair* and *Francis A. O'Brien, Howrey & Simon,* Washington, D.C.

FINAL ORDER

This matter having been remanded to the Commission by the United States Court of Appeals for the Ninth Circuit, and the Commission having concluded that further proceedings would not be in the public interest,

It is ordered, That the complaint be dismissed.

By the Commission. Commissioner Dixon dissented.

* Complaint, Initial Decision, Opinion of the Commission and Final Order originally published at 92 F.T.C. 1.

IN THE MATTER OF

INTERNATIONAL HARVESTER COMPANY

Docket 9147. Interlocutory Order, July 15, 1981

ORDER DENYING MOTION FOR STAY

On June 25, 1981, Administrative Law Judge Mathias certified to the Commission the question whether further proceedings in this matter are in the public interest.

On June 30, 1981, Judge Mathias refused respondent International Harvester Company's ("IH") request for a stay of further proceedings pending a Commission ruling on the certified question. On July 2, 1981, IH filed a motion for a stay with the Commission pursuant to Section 3.23(c) of the Commission's Rules of Practice. Complaint counsel opposed the motion for a stay in an answer filed on July 7, 1981. On July 9, 1981, IH moved for leave to file, and submitted, a reply memorandum to complaint counsel's answer. IH's reply memorandum is accepted. Because the active pretrial schedule begins on July 13, 1981, IH asks that the Commission grant a stay at the earliest possible time in order to avoid potentially unnecessary costs of litigation.

Section 3.23(c) of the Commission's Rules of Practice provides that an application for review and appeal shall not stay proceedings unless the ALJ or the Commission shall so order. This provision presumes that proceedings will continue unless a stay is appropriate in the opinion of the ALJ or the Commission. An important purpose of this provision is to facilitate discovery and trial with a minimum of interruption due to interlocutory issues that may arise. Generally speaking, the public interest in expeditious disposition of adjudicatory matters disfavors interlocutory suspensions of proceedings except in extraordinary circumstances. In addition, responsibility for resolving procedural questions of this type in adjudicatory matters generally has been left by the Commission to the sound discretion of the administrative law judges. The Commission does not lightly disturb their rulings on the course and conduct of the proceedings over which they preside.

IH argues that Judge Mathias' order places in serious issue whether this case is any longer in the public interest. In light of this development, IH argues that it would be wasteful to incur further costs of litigation during the pendency of Judge Mathias' order before the Commission. The Commission is in no position yet to judge the validity of the real premise for IH's motion for a stay, namely, that a decision to withdraw this matter from litigation is a likely

consequence of Judge Mathias' action and that further expense of litigation thus should be avoided. Until and unless the Commission finds such a likelihood or actually decides that this matter should be withdrawn from litigation, the public interest in expeditious completion of discovery and trial requires that the case go forward.

IH argues that the cost of pretrial litigation will be substantial, heightening the need for a stay. While the Commission is sensitive to IH's alleged financial difficulties and the added stress created by this case, Motion for Stay at 6–7, the cost of litigation, even if considerable, ordinarily is insufficient to support a stay.[1]

For these reasons, and because of the broad discretion our administrative law judges have on questions of this kind, the Commission does not believe that Judge Mathias' denial of IH's motion for a stay below should be set aside.[2]

Accordingly, it is ordered that respondent IH's motion for a stay filed with the Commission is hereby denied.

Commissioner Dixon voted in the negative.

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[1] Section 3.23 of the Commission's Rules is modeled after the appeal procedure of 28 U.S.C. 1292(b), in which interlocutory appeals do not stay further proceedings unless the district or appellate court so orders. Precedents under that provision thus can be useful to the Commission in interpreting its own rule governing stays pending appeal. The Commission notes that federal courts have rejected costs of litigation as a ground for a stay pending appeal. See, e.g., *Long v. Robinson*, 432 F. 2d 977, 980 (4th Cir. 1970), *quoting, Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921, 925, (D.C. Cir. 1958); *Reynolds Metal Co. v. Secretary of Labor*, 453 F. Supp. 4, 6–7 (W.D. Va. 1977).

[2] IH alleges that in denying a stay, Judge Mathias indicated that if the Commission felt the certified question raised a substantial issue, then the Commission was the appropriate body to issue a stay. Reply Memo at 2. To the extent IH is arguing that Judge Mathias suggested a stay is appropriate, we note that there is no recommendation for a stay in his order.

IN THE MATTER OF

SPERRY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3068. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires a New York City manufacturer, among other things, to cease disseminating advertisements which misrepresent that the Black Man's Shaver or any other device or commercial treatment will cure or minimize "razor bumps." Further, respondent is barred from making statements which are inconsistent with accepted medical opinion or which misrepresent the efficacy, performance or superiority of any drug or device. The order also requires that the company contact previous customers and make refunds to those eligible.

Appearances

For the Commission: *Mark Allan Heller* and *Teresa A. Hennessy.*

For the respondent: *Roger A. Clark, Rogers & Wells,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Sperry Corporation, formerly the Sperry Rand Corporation, (hereinafter "Sperry"), through its former Sperry-Remington Division, (hereinafter "Remington"), hereinafter at times referred to as respondent, has violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "Sperry" is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1290 Avenue of the Americas, New York, New York.

PAR. 2. "Sperry" has engaged in the business of manufacturing, advertising, and offering for sale, various products, including but not limited to, Remington's Black Man's Shaver, a product advertised for treating the shaving problems of Black men, to wit pseudofolliculitis barbae (hereinafter "razor bumps"), a disease primarily induced by shaving.

PAR. 3. In connection with the manufacture and marketing of the Black Man's Shaver, respondent has disseminated, published and distributed advertisements and promotional material for the purpose of promoting the sale of the Black Man's Shaver for human use. As advertised, this product is a "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its said business, the respondent has disseminated and caused the dissemination of certain advertisements concerning the Black Man's Shaver through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines with national circulations and the placement of advertisements with radio and television stations with sufficient power to broadcast across state lines and into the District of Columbia for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the Black Man's Shaver; and has disseminated and caused the dissemination of advertisements concerning the said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of the said product in commerce.

PAR. 5. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, are the following:

I used to have a shaving problem. Ingrown hairs that caused ugly razor bumps. Yeah, you know what that's like. But then, Remington came up with the answer. The Black Man's Shaver. The Black Man's Shaver cuts off my tough, curly whiskers to help prevent them from growing back into my skin and becoming those ugly bumps. * * * They're so sure the Black Man's Shaver will help reduce razor bumps, that they'll give you your money back if you're not completely satisfied. Man, that's a guarantee! So thanks to Remington, I said, 'so long messy depilatories. . .farewell beard. . .and bye bye bumps.' * * * The Black Man's Shaver by Remington. It's the answer to a black man's tough shaving problems.

* * * * * * *

If you're black like I am, shaving may cause problems. You know, those ugly razor bumps. You can camouflage them with a beard. Or mess with depilatories. But there's never been a real solution. Until now. Because now, Remington has created a revolutionary new shaving system called the Black Man's Shaver. * * * The Black Man's Shaver works so well, Remington guarantees it will help prevent razor bumps or they'll give you your money back. * * * The Black Man's Shaver by Remington. It's the first *real* answer to a Black man's shaving problem.

PAR. 6. Through the use of said advertisements referred to in

Paragraphs Four and Five and others, respondent represented directly or by implication that:

a. Use of the Black Man's Shaver will eliminate "razor bumps" for persons with that condition.

b. Growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

c. The Black Man's Shaver is the only effective means of treating "razor bumps."

d. Thirty (30) days is an adequate time period for consumers to evaluate the Black Man's Shaver's efficacy and to have a fair opportunity to take advantage of Remington's money back guarantee.

PAR. 7. In truth and in fact:

a. Use of the Black Man's Shaver will not eliminate "razor bumps" for persons with that condition.

b. Growing a beard is considered by accepted medical opinion the preferred method of treating "razor bumps", and therapeutic beards are prescribed often for the treatment of that condition.

c. Regardless of whether the Black Man's Shaver is effective for the treatment of "razor bumps", there are other methods of treating that condition which are effective.

d. Thirty (30) days is an inadequate time period for many consumers to evaluate the efficacy of the Black Man's Shaver, and many consumers are without a fair opportunity to take advantage of Remington's money back guarantee.

Therefore, the advertisements referred to in Paragraphs Four and Five were and are misleading in material respects, and constituted and now constitute false advertisements, and the representations set forth in Paragraph Six were and are false, deceptive, or unfair.

PAR. 8. Through the use of the said advertisements referred to in Paragraphs Four and Five and others, respondent represented directly or by implication, that the Black Man's Shaver is effective in the treatment of "razor bumps."

PAR. 9. There existed at the time of the first dissemination of the representation contained in Paragraph Eight no materials that provided a reasonable basis for the making of that representation. Therefore, the making and dissemination of the said representation as alleged, constituted, and now constitutes unfair or deceptive acts or practices in commerce.

PAR. 10. In the course and conduct of its aforesaid business, and

at all times mentioned herein, respondent has been in substantial competition in or affecting commerce with corporations, firms, and individuals representing or engaged in the manufacture or marketing of shaving products, shaving accessories and health-related devices.

PAR. 11. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and respondent's competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rule; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sperry Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1290 Avenue of the Americas, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Sperry Corporation ("Sperry"), a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of all drugs and devices as defined by Section 15 of the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will eliminate pseudofolliculitis barbae (hereinafter "razor bumps") for persons with that condition.

2. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will cure "razor bumps" for persons with that condition.

3. Represents that growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of the Black Man's Shaver or any other

product by persons afflicted with "razor bumps" will reduce or minimize that condition;

2. Represents that the Black Man's Shaver or any other product is efficacious for the treatment of "razor bumps";

3. Represents that the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment is superior to other treatments for "razor bumps"; or

4. Represents that any time period is adequate for consumers to evaluate the Black Man's Shaver's effectiveness in the treatment of "razor bumps",

unless at the time of each dissemination of such representation(s) respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the advertising, offering for sale, sale or distribution of all drugs and devices as defined in Section 15 of the Federal Trade Commission Act (excluding products not primarily advertised or promoted to consumers for personal, family or household use), which directly or indirectly:

1. Misrepresents the uniqueness of any such drug or device intended for human use.

2. Misrepresents the efficacy or performance of any such drug or device.

3. Makes representations, for the purpose of promoting the sale of any such drug or device, that are inconsistent with accepted medical opinion, *provided however,* that this provision, IC3, does not apply where statements inconsistent with accepted medical opinion are supported by a reasonable basis. Accepted medical opinion shall mean the general consensus of opinion of specialists as expressed in the medical literature, or if no such literature exists the consensus of the specialists themselves.

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II

It is ordered, That Sperry shall initiate or cause and pay the cost of (1) sending thirty (30) days after the Order is final, to all persons known to it or Remington Products, Inc., at that time, as purchasers of Sperry Remington's Black Man's Shaver, a questionnaire with a self-addressed, stamped envelope (attached hereto and incorporated as Attachment A) to determine, *inter alia,* whether a.) the 30 day period under respondent's advertised money back guarantee was too short for said purchasers to evaluate the performance of the Black Man's Shaver as a treatment for razor bumps, b.) the said purchasers were satisfied with the Black Man's Shaver, and c.) the said purchasers bought the Black Man's Shaver on or prior to February 28, 1979, and (2) sending within thirty (30) days after respondent's receipt of the completed questionnaire referred to above, to those persons who purchased the Black Man's Shaver on or prior to February 28, 1979, and who responded within thirty (30) days after the mailing of the questionnaire that they are dissatisfied with the Black Man's Shaver and that 30 days was not a sufficient time period in which to evaluate the Black Man's Shaver as a treatment for razor bumps, a notice (attached hereto and incorporated as Attachment B) which shall provide said purchasers an additional thirty (30) days from the date of receipt of the notice to request a refund under said money back guarantee. The word "refund", for purposes of this provision, shall mean the return of the requested purchase price not to exceed 30% above the distributor's price for the model of the Black Man's Shaver returned in response to this Order. Said refund shall be provided within six (6) to eight (8) weeks of receipt of purchaser's request for a refund. *Provided, however,* Sperry shall be exempt from the obligations of Part II of the Order where it has *actual knowledge* that a purchaser of its Black Man's Shaver purchased it after February 28, 1979.

III

It is further ordered, That Sperry shall forthwith distribute a copy of this Order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the Order.

It is further ordered, That respondent shall, within one hundred

fifty (150) days after this Order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this Order.

It is further ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts IB, and IC3 of this Order for a period of three (3) years after the dissemination of any advertisement which relates to these portions of the Order. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a demand for such material.

Attachment A

QUESTIONNAIRE

Dear Purchaser:

At this time, various aspects of the marketing of the Black Man's Shaver are being reviewed. We hope you are pleased with our product. In this regard we ask you to take a few minutes within the next thirty days and help us evaluate the Black Man's Shaver by completing the attached questionnaire and returning it to us in the attached self-addressed, stamped envelope. You may be entitled to a refund if you complete this questionnaire and return it to us within thirty (30) days of its receipt.

We at Sperry Corporation wish to thank you for your patronage and cooperation.

Sincerely,

Sperry Corporation

SURVEY

1. How long have you been using your Remington Black Man's Shaver?

3 weeks 4 weeks 5 weeks 6 weeks

7 weeks 8 weeks 9 weeks 10 weeks or longer

2. What shaving method did you use before you began using Remington?

Electric Safety razor or blade Depilatory

Other (Describe) _____

3. Before you used the Remington, how often did you get "bumps" from shaving?

Always Often Sometimes Never

4. Since using your Remington Shaver, has your problem with "bumps"

Decreased Remained the Same Increased

5. Do you feel that the beard lifter

Helps you a lot Helps a little

Does not help at all Not yet sure

How often do you use the beard lifter? _____

6. How do you rate your new Remington Black Man's Shaver compared to previous shaving methods?

Much Better Somewhat Better Equal

Somewhat Worse Much Worse

7. Based on your use so far, how satisfied are you?

Very Satisfied Somewhat Dissatisfied

Somewhat Satisfied Very Dissatisfied

8. If you were not satisfied, did you return the shaver under the 30 day money back guarantee provision?

Yes No

If you did not return the shaver, what did you do with it? _____

_____

9. Do you feel the 30 Day Trial offer allowed you sufficient time to evaluate the shaver's performance?

Yes

No. What would have been a better period of time?

_____

10. When did you purchase your Black Man's Shaver? (Check one from each column)

January/February	1977
March/April	1978
May/June	1979
July/August	1980
September/October	
November/December	

11. Will you recommend the Remington Black Man's Shaver to a friend?

Yes No

_____

_____

purchaser's name and address
(please print)

Envelope

Sperry Corporation
P.O. Box 1000
Bridgeport, Conn. 06602

Attachment B

Dear Purchaser:

Recently we sent you a survey regarding various aspects of the marketing of the Black Man's Shaver, including the 30 day money back guarantee. Inasmuch as you indicated that the original 30 day refund period did not allow you sufficient time to evaluate your shaver's performance, we are extending to you an additional thirty (30) days from the date of receipt of this letter to request a refund under the advertised money back guarantee for the Black Man's Shaver.

If you wish to take advantage of our offer, just return the shaver, postage prepaid, with your name, address and approximate purchase price, clearly and legibly written. For your convenience fill in the attached form showing your name, address and approximate purchase price and return it with your shaver to Sperry Corporation, P.O. Box 1000, Bridgeport, Connecticut 06602. You must respond within thirty (30) days from the date of receipt of this letter to receive a refund. Please allow 6–8 weeks for your check to arrive.

We at Sperry Corporation wish to thank you for your patronage and cooperation.

Sincerely,

Sperry Corporation

Enclosure

SPERRY REMINGTON BLACK MAN'S SHAVER REFUND FORM

Dear Gentlemen:

Enclosed is my Sperry Remington Black Man's Shaver which I am returning for a refund. Please mail my refund check to:

_____

(Name)

_____

(Address)

_____

(City, State and Zip Code)

The approximate price of the enclosed Black Man's Shaver is _____ .

_____

(Signature)

In the Matter of

DKG ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3069. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires, among other things, a New York City advertising agency to cease disseminating advertisements which misrepresent that the Black Man's Shaver or any other device or commercial treatment will cure or minimize "razor bumps." Further, respondent is barred from making statements which are inconsistent with accepted medical opinion or which misrepresent the efficacy, performance or superiority of any drug or device. The order also requires the company to maintain specific records for a period of 3 years and provide its operating divisions with a copy of the order.

Appearances

For the Commission: *Mark A. Heller* and *Teresa A. Hennessy.*

For the respondent: *Steven Winston, Kantor, Davidoff, Winston & Ferber, P.C.,* New York City.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that DKG Advertising, Inc., (hereinafter "DKG"), hereinafter at times referred to as respondent, has violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. "DKG" is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1271 Avenue of the Americas, New York, New York.

Par. 2. Respondent is now and for all times relevant to this complaint has been an advertising agency of Sperry-Rand Corporation (hereinafter "Sperry"), for its division Sperry-Remington (hereinafter "Remington"), and for all times relevant to this complaint has prepared and placed for publication, advertising material, including but not limited to the advertising referred to herein, to promote the sale for human use of the product Remington's Black Man's Shaver, a product advertised for treating the shaving prob-

lems of Black men, to wit pseudofolliculitis barbae (hereinafter "razor bumps"), a disease primarily induced by shaving. As advertised, this product is a "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its said business, the respondent has disseminated and caused the dissemination of certain advertisements concerning the Black Man's Shaver through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines with national circulations and the placement of advertisements with radio and television stations with sufficient power to broadcast across state lines and into the District of Columbia for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the Black Man's Shaver; and has disseminated and caused the dissemination of advertisements concerning the said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, are the following:

DKG ADVERTISING, INC. AS PRODUCED 11/16/77

CLIENT REMINGTON DATE December 7, 1977

JOB# RR-3485A Rev. #1 CODE# RM-40-77-60 PRODUCT Black Man's Shaver

TITLE "Shaving Problems" Rev. 1 LENGTH :60 Radio

BROADCAST COPY

SFX UNDER: HUMMING OF AN ELECTRIC SHAVER.

BLACK MAN:

I used to have a shaving problem. Ingrown hairs that caused ugly razor bumps. Yeah, you know what that's like. But then, Remington came up with the answer. The Black Man's Shaver. The Black Man's Shaver cuts off my tough, curly whiskers to help prevent them from growing back into my skin and becoming those ugly bumps. I didn't believe it at first. But those guys at Remington are smart dudes. They're so sure the Black Man's Shaver will help reduce razor bumps, that they'll give you your money back if you're not completely satisfied. Man, that's a guarantee! So thanks to Remington, I said, "So long messy depilatories...farewell beard...and bye, bye bumps." And my woman said, "Hello, sexy."

ANNCR:

The Black Man's Shaver by Remington. It's the answer to a black man's tough shaving problems.

D.J.:

The new Black Man's Shaver is available for the first time at: STORE NAMES. Satisfaction guaranteed or return shaver and sales slip to Remington within 30 days for a full refund.

DKG INC. 11/16/77

CLIENT REMINGTON DATE November 9, 1977

JOB# RR-3485A CODE# RM-39-77-60 PRODUCT Black Man Shaver

TITLE "If You're Black" Rev #2 LENGTH :60 Radio

BROADCAST COPY

BLACK ANNOUNCER:

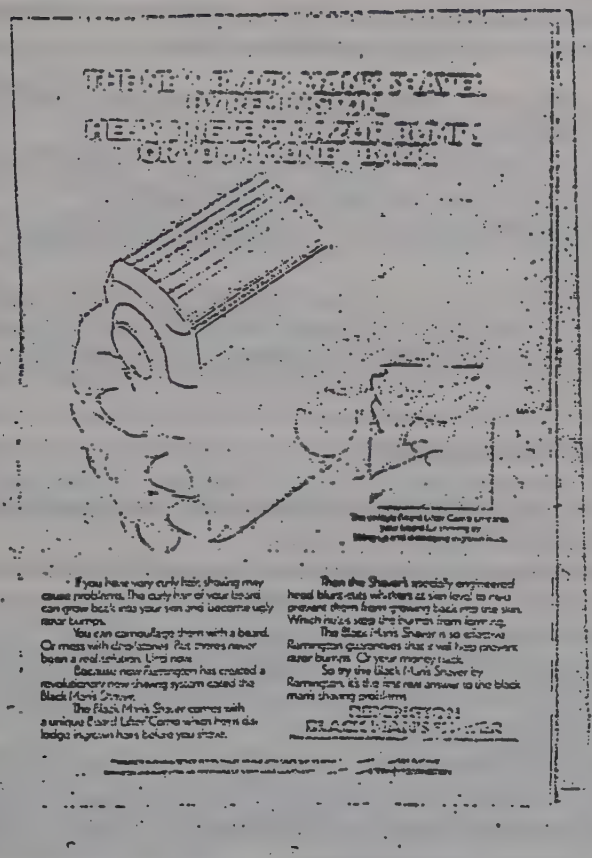
If you're black like I am, shaving may cause problems. You know, those ugly razor bumps. You can camouflage them with a beard. Or mess with depilatories. But there's never been a real solution. Until now. Because now, Remington has created a revolutionary new shaving system called The Black Man's Shaver. It comes with a unique Beard Lifter comb which helps dislodge ingrown hairs before you shave. Then the shaver's specially engineered head, blunt cuts your whiskers at skin level to help prevent them from growing back into your skin. The Black Man's Shaver works so well, Remington guarantees it will help prevent razor bumps or they'll give you your money back. Man, that's a guarantee. The Black Man's Shaver by Remington. It's the first real answer to a black man's shaving problem.

LIVE ANNCR:

The new Black Man's Shaver is available for the first time at: Store names.

Satisfaction guaranteed or return shaver and sales slip to Remington within 30 days for a full refund.

[illegible] 1271 AVENUE OF THE AMERICAS NEW YORK NY 10020/(212) 489-7300/CABLE DEEKAYGEE NEW YORK



If you have very curly hair, shaving may cause problems. The curly hair of your beard can grow back into your skin and become ugly razor bumps.

You can camouflage them with a beard. Or mess with chin creams. But none's never been a real solution. Until now.

Because now Remington has created a revolutionary new shaving system called the Black Mane Shaver.

The Black Mane Shaver comes with a unique Beard Lifter Comb which hairs old lodged in your skin before you shave.

Then the Shaver's specially engineered head blunt cuts whiskers at skin level to help prevent them from growing back into the skin. Which helps keep the hairs from curling.

The Black Mane Shaver is so close-cut Remington guarantees that it will help prevent razor bumps. Or your money back.

So try the Black Mane Shaver by Remington. It's the one new answer to the black mane shaving problem.

REMINGTON
BLACK MANE SHAVER

PAR. 5. Through the use of said advertisements referred to in Paragraphs Three and Four and others, respondent represented and now represents, directly or by implication that:

a. Use of the Black Man's Shaver will eliminate "razor bumps" for persons with that condition.

b. Growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

c. The Black Man's Shaver is the only effective means of treating "razor bumps".

d. Thirty (30) days is an adequate time period for consumers to evaluate the Black Man's Shaver's efficacy and to have a fair opportunity to take advantage of Remington's money back guarantee.

PAR. 6. In truth and in fact:

a. Use of the Black Man's Shaver will not eliminate "razor bumps" for persons with that condition.

b. Growing a beard is considered by accepted medical opinion the preferred method of treating "razor bumps", and therapeutic beards are prescribed often for the treatment of that condition.

c. Regardless of whether the Black Man's Shaver is effective for the treatment of "razor bumps", there are other methods of treating that condition which are effective.

d. Thirty (30) days is an inadequate time period for many consumers to evaluate the efficacy of the Black Man's Shaver, and many consumers are without a fair opportunity to take advantage of Remington's money back guarantee.

Therefore, the advertisements referred to in Paragraphs Three and Four were and are misleading in material respects, and constituted, and now constitute, false advertisements, and the representations set forth in Paragraph Five were and are false, deceptive, or unfair.

PAR. 7. Through the use of the said advertisements referred to in Paragraphs Three and Four and others, respondent represented, and now represents, directly or by implication, that the Black Man's Shaver is effective in the treatment of "razor bumps."

PAR. 8. There existed at the time of the first dissemination of the representation contained in Paragraph Seven no reasonable basis for the making of that representation. Therefore, the making and dissemination of the said representation as alleged, constituted, and now constitutes, unfair or deceptive acts or practices in commerce.

PAR. 9. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been and now is in substantial competition in or affecting commerce with other advertising agencies.

PAR. 10. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and respondent's competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rule; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent DKG Advertising, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1271 Avenue of the Americas, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent DKG Advertising, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of all devices as defined by Section 15 of the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will elminate pseudofolliculitis barbae (hereinafter "razor bumps") for persons with that condition, *provided however,* that the respondent shall have an affirmative defense to this provision if it can prove that the statements prohibited herein are in fact true.

2. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will cure "razor bumps" for persons with that condition, *provided however,* that the respondent shall have an affirmative defense to this provision if it can prove that the statements prohibited herein are in fact true.

3. Represents that growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

4. Misrepresents the uniqueness of any device intended for human use.

B. Disseminating or causing the dissemination of any advertise-

ment by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of the Black Man's Shaver or any other product by persons afflicted with "razor bumps" will reduce or minimize that condition;
2. Represents that the Black Man's Shaver or any other product is efficacious for the treatment of "razor bumps";
3. Represents that the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment is superior to other treatments for "razor bumps";
4. Represents that any time period is an adequate time period for consumers to evaluate the Black Man's Shaver's effectiveness in the treatment of "razor bumps",

unless at the time of each dissemination of such representation(s) respondent possesses and relies upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations, for the purpose of promoting the sale of a device, that are inconsistent with accepted medical opinion unless a reasonable basis exists therefor. Accepted medical opinion shall mean the general consensus of opinion of specialists as expressed in the medical literature, or if no such literature exists, the consensus of the specialists themselves.

It is further ordered, That DKG Advertising, Inc. shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days

after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts B and C of this Order for a period of three (3) years after the dissemination of any advertisement which relates to these portions of the Order. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a demand for such material.

In the Matter of

YKK (U.S.A.) INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 (A) OF THE CLAYTON ACT

Docket C-3070. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires a New Jersey based firm engaged in the manufacture and sale of finished zippers, zipper chain and sliders, among other things, to cease discriminating in price between different customers on the same functional level, purchasing products of like grade and quality, through the use of discriminatory prices and rebates.

Appearances

For the Commission: *Randall S. Leff* and *Karen G. Bokat.*

For the respondent: *Francis Y. Sogi, Miller, Montgomery, Sogi, Brady & Taft,* New York City, *James H. Lundquist, Barnes, Richardson & Colburn,* New York City, and *Salvatore A. Romano, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

Complaint

The Federal Trade Commission, having reason to believe that the above named respondent, subject to the jurisdiction of the Commission, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) and of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, charging as follows:

Paragraph 1. Respondent YKK (U.S.A.) Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 1251 Valley Brook Ave., Lyndhurst, New Jersey.

Par. 2. Respondent is now and for many years has been engaged in the manufacture, distribution and sale of finished zippers, zipper chain and sliders.

Par. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, and the Federal Trade Commission Act, as amended, having sold or shipped its products or caused them to be transported from its principal place of business in New Jersey

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or manufacturing facility in Georgia to customers located in other States of the United States or the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has discriminated in price between different purchasers of finished zippers of like grade and quality, zipper chain of like grade and quality, and sliders of like grade and quality in commerce through the use of discriminatory prices, discounts, rebates and deductions on sales within the United States.

PAR. 5. The effect of respondent's discriminations in price alleged in Paragraph 4 has been or may be substantially to lessen or prevent competition in the sale of finished zippers, zipper chain and sliders.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein contemplated.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent YKK (U.S.A.) Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and the principal place of business located at 1251 Valley Brook Ave., Lyndhurst, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order the following definitions apply:

1. *Slide Fastener Manufacturer* means an integrated manufacturer who produces finished zippers, zipper chain, and sliders.

2. *Assembler* means a customer who purchases finished zippers, zipper chain, sliders or components such as tops, bottoms, opening parts and wire from various manufacturers and assembles and sells finished zippers.

3. *Jobber* means a customer who a) purchases finished zippers of various sizes from manufacturers and assemblers for sale to users or b) purchases zipper chain and sliders for resale without assembly or finishing.

4. *User* means a customer who purchases finished zippers, zipper chain, sliders and components in order to incorporate them in products other than finished zippers that it manufactures.

I

It is ordered, That respondent YKK (U.S.A.) Inc. and its officers, representatives, agents, employees, successors, and assigns, directly, indirectly, or through any corporate or other device, in or in connection with the sale of finished zippers of like grade and quality, zipper chain of like grade and quality, or sliders of like grade and quality in or affecting commerce as "commerce" is defined in the amended Clayton Act or Federal Trade Commission Act do forthwith cease and desist from:

Discriminating directly or indirectly in the price of finished zippers of like grade and quality, zipper chain of like grade and quality, or sliders of like grade and quality as between customers on the same functional level where respondent YKK is in competition

with any slide fastener manufacturer in the sale of finished zippers, zipper chain, or sliders or with any assembler in the sale of finished zippers. For the purposes of this Order, assemblers, jobbers and users are on different functional levels.

II

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its operating departments and divisions engaged in the offering for sale, sale, distribution, marketing, or promotion of finished zippers, zipper chain and sliders.

III

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate organization that may affect compliance obligations arising out of this Order, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

IV

It is further ordered, That respondent shall within sixty (60) days after service on it of this Order file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it is complying and has complied with this Order.

IN THE MATTER OF

MILES LABORATORIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON ACT

Docket C-3071. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires an Elkhart, Indiana manufacturer and seller of various non-prescription health care products, among other things, to cease failing to make its advertising and promotional allowances available on proportionally equal terms to all customers, both direct and indirect. The order also requires the company to notify all its customers, as specified, of its advertising and promotional programs, and of the availability of usable and economically feasible alternatives. Respondent is further required to distribute a special written notice informing customers of the modification in its promotional programs and provide its sales personnel with a copy of the order.

Appearances

For the Commission: *Randall S. Leff.*

For the respondent: *Franklin Breckenridge,* in-house counsel, Elkhart, Ind. and *James M. Johnstone, Kirkland & Ellis,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 41, *et seq.*) and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint, charging as follows:

PARAGRAPH 1. Respondent, Miles Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1127 Myrtle St., Elkhart, Indiana.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale and distribution of adult vitamins, pediatric vitamins and antacid products.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act, having sold

and shipped its products or caused them to be transported from its principal place of business in Indiana to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as promotional allowances, either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the offering for sale or sale of respondent's products.

PAR. 5. Respondent's promotional allowances discriminated against particular customers or classes of customers in that they were not available, in a practical business sense, on proportionally equal terms to all customers competing in the sale and distribution of respondent's products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowance plan is not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein contemplated.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Miles Laboratories, Inc., a corporation, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and

having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Miles Laboratories, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and the principle place of business located at 1127 Myrtle St., in the City of Elkhart, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

A. *It is ordered,* That respondent, Miles Laboratories, Inc., a corporation, and its officers, directors, agents, representatives and employees, and its successors and assigns, directly or indirectly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of adult vitamins, pediatric vitamins, antacid products, topical antiseptics such as Bactine, or other nonprescription health care products, except diagnostics, environmental control products, steroid products, aluminum acetate products, acne treatment products, medicated paste bandages and colloidal bath products (hereinafter referred to as "Respondent's Covered Products") in or affecting commerce, as "commerce" is defined in the Clayton Act, as amended, or the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer as compensation or in consideration for any advertising or promotional services or any other service or facility furnished by or through such customer in connection with the handling, sale or offering for sale of any of Respondent's Covered Products, unless (1) such payment or consideration is made available on proportionally equal terms to all customers, including customers who do not purchase directly from respondent, who compete in the distribution or resale of Respondent's Covered Products; and (2) all

customers, including customers who do not purchase directly from respondent, who compete in the distribution or resale of Respondent's Covered Products are informed, in writing, in the manner provided in Paragraph I B, of (a) the terms and conditions of the promotional program or plan under which such payments are made, including the services or facilities to be furnished and the methods by which performance will be proved; and (b) the availability of usable and economically feasible alternative services or facilities which competing customers could provide and be paid for on proportionally equal terms if the furnishing of identical services or facilities would not be economically feasible and usable in a practical business sense by all competing customers.

B. *It is further ordered,* That respondent shall inform all customers of the terms and conditions of each of its advertising or promotional programs, the methods by which performance will be proved, and the availability of alternatives, as required by Paragraph I A, in the following manner:

1. Respondent shall cause copies of deal sheets or similar materials explaining the plan or program to be presented or delivered to each direct customer of respondent in sufficient time to enable each such customer to make an informed judgment whether to participate, and

2. At or about the same time respondent shall deliver sufficient copies of deal sheets or similar materials to respondent's wholesalers for presentation or distribution to each customer of such wholesalers that purchases any of Respondent's Covered Products. Respondent shall take steps, which need not include direct mailings, to insure that its indirect purchasing customers are informed of its advertising or promotional programs.

II

It is further ordered, That respondent shall within thirty (30) days after service upon it of this order notify each retailer that purchased less than $5,000 of Respondent's Covered Products in 1979 of the availability of alternative methods of participation in respondent's advertising or promotional allowance programs by distributing a written notice in the form attached hereto as Exhibit A in the following manner:

(1) Respondent's sales representatives will hand deliver sufficient copies of such notice to respondent's wholesalers for distribu-

tion to each customer of such wholesalers that purchases any of Respondent's Covered Products;

(2) Respondent will send such notice by direct mail to each retailer that buys Respondent's Covered Products directly from respondent and purchased less than $5,000 of such products in 1979; and

(3) Respondent will notify independent pharmacies by placing such notice in PHARMALERT, a national coop mailing service for independent drug stores.

III

It is further ordered, That respondent shall deliver a copy of this order to cease and desist to all sales and sales management personnel employed on the date of service of this order in each of respondent's operating divisions that is engaged in the sale of Respondent's Covered Products within the United States.

IV

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

V

It is further orderd, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Dear Retailer:

Miles has recently revised its promotional trade advertising policy to encourage greater participation in its promotions by smaller direct retailers and non-direct retailers. We are recognizing the fact that some accounts would prefer more flexibility in advertising performance requirements, and for this reason we feel our new trade advertising policy will better serve your needs. We anticipate the ultimate results will be a stronger promotional program for both you and Miles.

TRADE ADVERTISING PERFORMANCE REQUIREMENTS

To receive promotional advertising payments a qualifying performance must be rendered by a participating account employing their most used medium such as newspapers, radio, television, circulars, handbills, window/wall banners, in-store displays, feature pricing, etc.

Upon completion of the advertising performance, the retailer must submit his invoice (or paid wholesaler invoice) to Miles along with a Miles Certificate of Advertising Performance for advertising other than newspaper, radio and television. This form provides for a description of the advertising performance rendered by the account with the specific date(s) of performance. (See Attachment 1)

We look forward to your greater participation in Miles' promotions through your own creative advertising performance.

MILES LABORATORIES, INC.

ATTACHMENT 1

CERTIFICATE OF ADVERTISING PERFORMANCE
(Non-Direct Retailers)

This is to certify that advertising performance was rendered on the following Miles Laboratories, Consumer Products Division brands and package sizes:

Brand/Package Size(s)	Date(s) of Performance	Regular Price	Feature Price
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Performance rendered on the above brands was my normal and most frequently employed form of advertising and price featuring to my customers. (Check form of advertising)

( ) Newspaper (tearsheet attached)
( ) Radio (script/affidavit attached)
( ) Television (script/affidavit attached)
( ) Home delivered Circular/Handbill (attached)
( ) Window/Wall Banner (attached)
( ) In-Store Extra Off-shelf Display (Describe)

_____

_____

( ) Other (describe) _____

_____

Attached is my original paid wholesaler invoice to verify promotional purchases of the above ad featured Miles Brands.

Retailer's Name _____

Address _____

City _____ State _____ Zip Code _____

Authorized Signature for Retailer

_____

_____

(Title)

Send to MILES LABORATORIES, INC.
Dept. "G"
P. O. Box 340
Elkhart, IN 46515

IN THE MATTER OF

ZALE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket C-3072. Complaint, Aug. 4, 1981—Decision, Aug. 4, 1981

This consent order requires, among other things, that a Dallas, Texas retailer cease, in connection with the extension of open end credit, failing to comply with the billing error resolution procedures required by the Fair Credit Billing Act. The firm is required to send a prescribed "Billing Complaint Form" to specified customers and upon receipt of such form, investigate each billing error claim and either refund or credit the amount in error, or provide the customer with proof that the claim was incorrect; take reasonable steps to correct any erroneous credit report; and pay all unpaid credit balances which existed after April 1, 1975, plus daily interest. The order also requires the firm to include a specified disclosure on all future periodic statements which reflect a credit balance, and pay all credit balances upon written request, or automatically after 7 months if no request has been made.

Appearances

For the Commission: *David Pender, George Zweibel* and *Rachel Garson.*

For the respondent: *Charles Stewart,* Vice-President and Associate General Counsel, Zale Corp.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and its implementing Regulation Z, duly promulgated by the Board of Governors of the Federal Reserve System, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Zale Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Regulation Z, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Respondent Zale Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3000 Diamond Park Drive, Dallas, Texas.

PAR. 2. Respondent is now, and for some time last past has been, engaged directly and through its subsidiaries in the advertising,

offering for sale, sale and distribution of jewelry merchandise, footwear, drug store products, sporting goods, and related products to the public at retail.

PAR. 3. At all times relevant hereto respondent, directly and through its subsidiaries, in the ordinary course of business, did and does regularly extend, offer to extend, arrange, or offer to arrange "consumer credit" for its customers' purchases, and has been and is a "creditor" [as those terms are defined in Section 226.2(p) and (s) of Regulation Z, 12 C.F.R. 226.2(p) and (s), respectively]. The transactions involve the extension of "open end credit" [as defined in Section 226.2(x) of Regulation Z, 12 C.F.R. 226.2(x)].

PAR. 4. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices herein set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Count I

Alleging violations of the Truth in Lending Act and its implementing Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraphs One through Three are incorporated by reference herein as if fully set forth verbatim.

PAR. 5. Subsequent to October 28, 1975, pursuant to its aforesaid extensions of credit, respondent has in many instances received from customers "proper written notification of a billing error" [as defined in Section 226.2(cc) of Regulation Z, 12 C.F.R. 226.2(cc)]. In several such instances respondent has:

1. Contrary to the requirements of Section 226.14(a)(1) of Regulation Z, 12 C.F.R. 226.14(a)(1), failed to take any of the following actions within 30 days after receipt of the notification:

a. Mail or deliver to the customer a written acknowledgement thereof;

b. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

c. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

2. Contrary to the requirements of Section 226.14(a)(2) of Regulation Z, 12 C.F.R. 226.14(a)(2), failed to take either of the following actions within the lesser of 90 days or two complete billing cycles from the date of receipt of the notification:

a. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

b. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

3. Failed to retain for at least two years the written notifications of billing errors, copies of all correspondence in response thereto, and other evidence of compliance with Section 226.14(a) of Regulation Z, 12 C.F.R. 226.14(a), as required by Section 226.6(i) of Regulation Z, 12 C.F.R. 226.6(i).

PAR. 6. Pursuant to Section 103(s) of the Truth in Lending Act, 15 U.S.C. 1602(s), respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, 15 U.S.C. 1607(c), respondent has engaged in unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, all to the prejudice and injury of the public.

Count II

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Six are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. By failing in certain instances, after receipt of written notification from customers questioning or disputing billed charges, to correct erroneous billings to the affected accounts, respondent caused a substantial number of its customers to be deprived of the use of significant sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five were and are unfair and/or deceptive.

PAR. 8. The acts and practices of respondent set forth in Paragraph Seven were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Count III

Alleging violations of the Truth in Lending Act and its implementing Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraphs One through Three are incorporated by reference herein as if fully set forth verbatim.

PAR. 9. On various occasions a substantial number of individual

customers' accounts had "credit balances," representing amounts of money owed to the customers by respondent. These credit balances were the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 10. In several such instances respondent failed to mail or deliver to the customer, for each billing cycle at the end of which there was an outstanding credit balance in excess of $1.00 in the account, a periodic statement appropriately identifying the outstanding balance in the account at the beginning of the billing cycle, the amounts and dates of crediting to the account during the billing cycle for payments and other credits, and the credit balance on the closing date of the billing cycle, as required by Section 226.7(b)(1)(i), (iii) and (ix) of Regulation Z, 12 C.F.R. 226.7(b)(1)(i), (iii) and (ix).

PAR. 11. Subsequent to October 28, 1975, in connection with its aforesaid extensions of credit, respondent in several instances failed to mail or deliver to its customers a periodic statement setting forth an address to be used by respondent for the purpose of receiving billing inquiries from customers, as required by Section 226.7(b)(1)(x) of Regulation Z, 12 C.F.R. 226.7(b)(1)(x).

PAR. 12. The allegations of Paragraph Six are incorporated by reference herein as if fully set forth verbatim.

Count IV

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four, Nine and Ten are incorporated by reference herein as if fully set forth verbatim.

PAR. 13. The following are additional pertinent aspects of respondent's past practices in handling charge accounts of customers who had a credit balance:

1. With the possible exception of billing cycles in which a credit balance was created or in which there occurred a transaction that increased or reduced but did not fully offset a credit balance not yet cleared from the customer's account, in certain instances respondent failed to provide to the customer a periodic statement setting forth the amount of the credit balance.

2. If the customer made further purchases on the account within a limited period of time determined by respondent, respondent applied the amount of the credit balance to reduce or eliminate the customer's obligation created by such further purchase or purchases.

3. If the customer neither requested a refund of the amount of the credit balance nor made a purchase within the aforesaid limited period of time, respondent, through bookkeeping entries, deleted the

amount of the credit balance from the customer's account. No payment was made to the customer and the deleted credit balance was not applied to any purchase subsequently made on the customer's account.

4. Respondent did not refund credit balances to customers unless a specific request therefor was made by or on behalf of the customer.

PAR. 14. By failing to notify customers whose accounts reflected credit balances that such balances existed and that they would be refunded on request; by deleting credit balances from customers' accounts without refunding such amounts; by failing to refund credit balances without request therefor; and by issuing subsequent billing statements which did not reflect such credit balances, respondent caused a substantial number of its customers to be deprived of the use of significant sums of money rightfully theirs. Therefore, the acts and practices described in Paragraphs Nine, Ten, and Thirteen above were and are unfair and/or deceptive.

PAR. 15. The acts and practices of respondent set forth in Paragraphs Thirteen and Fourteen were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty days, now in future conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Zale Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 3000 Diamond Park Drive, in the City of Dallas, State of Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Zale Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of "open end credit," including "consumer credit" extended on an account by use of a "credit card," as those terms are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.,* as amended), do forthwith cease and desist from:

A. Failing, within 30 days after receipt of any proper written notification of a billing error (as defined in Regulation Z), to mail or deliver a written acknowledgment thereof to the customer's current designated address, as prescribed by Section 226.14(a)(1) of Regulation Z, 12 C.F.R. 226.14(a)(1), unless:

1. the customer has agreed, within such 30-day period, that the periodic statement is correct; or
2. respondent has taken the applicable action specified in Paragraph I.B.1–3 of this Order within such 30-day period.

B. Failing, not later than two complete billing cycles (and in no event more than 90 days) from the date of receipt of any proper written notification of a billing error, to resolve the dispute by:

1. correcting the customer's account in the full amount indicated by the customer to have been erroneously billed, and mailing or delivering to the customer a written notification of correction(s) in

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the manner prescribed by Section 226.14(a)(2)(i) of Regulation Z, 12 C.F.R. 226.14(a)(2)(i); or

2. correcting the customer's account by an amount different from that indicated by the customer as being erroneously billed, and mailing or delivering to the customer a written explanation of the change(s), accompanied by copies of documentary evidence of the customer's indebtedness if such evidence is requested by the customer, in the manner prescribed by Section 226.14(a)(2)(ii) of Regulation Z, 12 C.F.R. 226.14(a)(2)(ii); or

3. mailing or delivering to the customer, after having conducted a reasonable investigation, a written explanation or clarification which sets forth the reason(s) why respondent believes the periodic statement is correct, and, if the customer requests, furnishing copies of documentary evidence of the customer's indebtedness, in the manner prescribed by Section 226.14(a)(2)(iii) of Regulation Z, 12 C.F.R. 226.14(a)(2)(iii).

Provided, however, That respondent need not perform the actions specified in this Paragraph I.B if the customer has agreed, not later than two complete billing cycles (and in no event more than 90 days) from the date of respondent's receipt of the proper written notification of a billing error, that the periodic statement is correct.

C. Taking or causing any action, prior to the time the dispute has been resolved as provided in Paragraph I.B. of this Order, to collect:

1. any portion of an amount indicated in the customer's notification as being a billing error; or

2. any finance charge, late payment charge, or other charge computed on such disputed amount.

D. Failing, in each instance where respondent has not complied with any requirement of Section 226.14 of Regulation Z, 12 C.F.R. 226.14, to forfeit the right to collect from the customer the amount indicated to be a billing error, including corresponding finance and other charges, up to $50 (the "forfeited amount"), as required by Section 226.14(f)(1) of Regulation Z, 12 C.F.R. 226.14(f)(1).

1. If the customer pays or has paid all or part of the forfeited amount, respondent shall either credit that amount to the customer's account or refund it to the customer, and shall notify the customer as to why the credit or refund has been made.

2. If the customer has not paid all or part of the forfeited amount, respondent shall act in a manner consistent with such forfeiture; for example, respondent shall not reflect such amount in periodic

statements, take any collection action, or report nonpayment to any third party. Where appropriate, respondent shall provide an explanation of action(s) it has taken.

E. Failing to comply with any requirement of Section 226.14 of Regulation Z, as amended, 12 C.F.R. 226.14, as amended.

F. Failing to mail or deliver to each customer who has an open end credit account, for each billing cycle at the end of which there is an outstanding debit or credit balance in excess of $1.00 in that account or with respect to which a finance charge is imposed, a statement which the customer may retain and which:

1. sets forth the amount of the outstanding balance in the account at the beginning and closing dates of the billing cycle, and appropriately identifies any credit balance as such, as required by Section 226.7(b)(1)(i) and (ix) of Regulation Z, 12 C.F.R. 226.7(b)(1)(i) and (ix);

2. sets forth the amounts and dates of crediting to the account during the billing cycle, as required by Section 226.7(b)(1)(iii) of Regulation Z, 12 C.F.R. 226.7(b)(1)(iii);

3. sets forth an address to be used by respondent for the purpose of receiving billing inquiries from customers, preceded by the caption "Send Inquiries To:" indicating that the address is the proper location to send such inquiries, as required by Section 226.7(b)(1)(x) of Regulation Z, 12 C.F.R. 226.7(b)(1)(x); and

4. sets forth all other items required by Section 226.7(b) of Regulation Z, 12 C.F.R. 226.7(b), in the manner prescribed by Section 226.7(c) of Regulation Z, 12 C.F.R. 226.7(c).

G. Failing to comply with any requirement of Section 226.7(a)(9), (d), (g), and (h) of Regulation Z, 12 C.F.R. 226.7(a)(9), (d), (g), and (h).

II

It is further ordered, That respondent:

A. Shall prepare a form (hereinafter referred to as Billing Complaint Form) in exactly the wording set forth in Attachment A of this Order (except that the name of the issuing entity may change as appropriate), printed clearly and conspicuously in 10-point, .075 inch computer or larger type. This form shall be mailed in duplicate, accompanied by a pre-addressed return envelope, with no additional information to the contrary or in mitigation thereof, within 120 days after service upon it of this Order:

1. to each person to whom a periodic statement is mailed or delivered at any time during either of two consecutive billing cycles within the aforesaid 120-day period;

2. to each other person whose open end credit account has been administered by or assigned to respondent's Zale Division Central Credit Offices in Seattle, Washington, and Portland, Oregon, at any time between October 28, 1975, and the date of service of this Order; provided that where an account has been maintained in the names of more than one person, respondent may send one Billing Complaint Form; and

3. to each other person who makes a written complaint, other than a proper written notification of a billing error (as defined in Regulation Z), about a billing error that occurred on or after October 28, 1975, but before the date of service of this Order upon respondent; *provided,* that if respondent receives such a written complaint more than 120 days after service upon it of this Order, respondent must mail the Billing Complaint Form within 30 days of receiving such complaint.

B. Shall send to all of respondent's retail store and credit center personnel, within 10 days from the date of publication in the *Federal Register* of the agreement containing this Order, a bulletin which instructs them that in the event they receive an oral complaint about a billing error that occurred on or after October 28, 1975, but before the date of service of this Order upon respondent, each such complainant is to be advised (1) to make the complaint in writing, and (2) to whom such complaint is to be mailed or otherwise delivered.

C. Shall, within 60 days after receipt of each Billing Complaint Form:

1. conduct and complete a reasonable investigation of the claimed billing error(s).

2. if the claimed billing error(s) is (are) incorrect, mail or deliver a written explanation to the customer setting forth the reason(s) why respondent believes the customer was mistaken, and furnish copies of all documents which support respondent's conclusion.

3. if the claimed billing error(s) is (are) correct in whole or part, or if respondent does not have documentary evidence showing that such claim(s) is (are) incorrect:

a. mail a check to the customer in the amount of the billing error(s); or

b. if an account for the customer exists, make a credit to the customer's account in the amount of the billing error(s); or

c. open an account for the customer if no account exists therefor at that time, if the customer consents in writing to an account being opened, and make a credit to that account in the amount of the billing error(s).

4. if respondent makes a payment or credit pursuant to Paragraph II.C.3 of this Order, and the customer has indicated on the Billing Complaint Form that a disputed account has been reported to any third party as delinquent, correct respondent's records to show that the account was paid as agreed, and take reasonable steps to insure that the report to any third parties is corrected, *provided* the customer submits his/her address and account number or other information to enable respondent to identify such party (parties).

5. notify the customer in writing of the action(s) taken pursuant to this Paragraph II.C. For purposes of this subparagraph, respondent may place the required writing, *inter alia,* on a check, payment voucher attached to a check, or on the front or reverse of a periodic statement.

III

It is further ordered, That respondent Zale Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in the handling of credit balances arising subsequent to service of this Order, on open end credit accounts created or maintained in connection with the sale of merchandise or services to the public, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Include the following disclosure clearly and conspicuously in 10-point, .075 inch computer or larger type, separated from any other written matter, entirely on the front side of each periodic statement reflecting a credit balance, and accompanied by a pre-addressed return envelope:

To get your credit balance now, write "I want a refund" on this statement. Mail it back to us in the enclosed envelope.

B. Refund the full amount of each credit balance within 30 days after a customer requests a refund by mail, except to the extent that such amount has already been refunded or credited against further purchases on that account.

C. Refund the full amount of each credit balance in excess of $1.00 no later than 30 days after the end of the sixth consecutive month during which a credit balance existed. The amount to be refunded shall be the credit balance existing at the end of the sixth month.

D. Refrain from writing off, deleting or transferring any credit balance in excess of $1.00 until a refund has been made or until the customer has made a fully offsetting purchase, unless respondent has taken all applicable actions required by Parts III and V.B of this Order with respect to that account.

E. Refrain from writing off, deleting or transferring any credit balance of $1.00 or less until:

1. the customer has made a fully offsetting purchase; or
2. the credit balance has existed for seven consecutive months and the customer has been advised at least once in writing that such credit balance will be forfeited after it has existed for seven months unless a refund is requested by the customer.

F. Send to all of respondent's retail store and credit center personnel, within 10 days from the date of publication in the *Federal Register* of the agreement containing this Order, a bulletin which instructs them that in the event they receive a request for a refund of a credit balance they are to advise the person requesting such refund (1) to make the request in writing, and (2) to whom such request is to be mailed or otherwise delivered.

IV

It is further ordered, That respondent shall, with respect to each customer whose open end account had a credit balance in excess of $1.00 at any time between April 1, 1975, and the date of service of this Order (if such balance has not been refunded, no fully offsetting purchase has been made, or the attempts to locate the customer described in Part V.B of this Order have not been made):

A. Mail a check to the customer in the amount of the credit balance, including daily interest on such amount from the date of its creation, computed at an annual rate of 6 percent (simple) interest, no later than 90 days after the service of this Order.

Provided, however, That respondent need not pay interest on any credit balance for which a refund check in the amount of the credit balance was mailed by respondent to the customer prior to August 4, 1978.

B. Notify the customer in writing that the check represents a refund of the credit balance, plus interest on the credit balance (if any). This notification must be placed on the check, on the payment voucher attached to the check, or on a notice sent with the check.

C. Refrain from writing off, deleting or transferring any such credit balance until a refund has been made or the customer has made a fully offsetting purchase, unless respondent has taken all applicable actions required by Parts IV and V.B of this Order with respect to that account.

V

It is further ordered, That:

A. Each payment required by this Order shall be given to the customer in person or by mailing a check payable to the order of the customer.

B. Each check, Billing Complaint Form, disclosure, or notice required by this Order shall be sent by First Class mail in an envelope which clearly states that it is from respondent (or the entity of respondent which the customer did business with), to the customer's last address shown in respondent's records. Each check required to be sent by this Order, and each Billing Complaint Form required to be sent by Paragraphs II.A.2 and II.A.3 of this Order, shall include the notation "Address Correction Requested" on the envelope. In the event that any such check, disclosure or notice concerning a credit balance or payment in the amount of $10 or more is returned to respondent undelivered, respondent shall obtain from a credit bureau the most current address(es) available for the customer by means of an in-file report or other report on information then existing in the credit bureau's files. If a new address is obtained, respondent shall then resend such check, disclosure, or notice by First Class mail to the customer at the most current address obtained.

C. For each credit balance refund unpaid despite performance of the steps set out in Paragraph V.B of this Order, respondent:

1. shall, except as provided in Paragraph V.C.2 of this Order, make available to the customer as a credit to his/her account the full amount of the credit balance for one year from the date on which the most recent mailing was returned; and

2. shall refund the full amount of the credit balance within 30 days of any subsequent oral or written request therefor by the customer.

VI

It is further ordered, That respondent shall maintain complete business records relative to the manner and form of its continuing compliance with this Order, including but not limited to (1) the data enumerated in Paragraph VII.E of this Order; (2) the number and dollar amounts of credit balances refunded, on an annual basis; and (3) the name and address of each customer who requested a refund of a credit balance but whose request was refused, the date and amount of the request, and the date and reason(s) for the refusal. With respect to Paragraphs I.A–I.D of this Order, such records shall include every written notification of billing error respondent received, copies of all notices, corrections and correspondence mailed or delivered in response thereto, documentation of "reasonable investigations," and all other evidence of compliance. Respondent shall retain all such records and data for at least three years and shall, upon reasonable notice, make them available for examination and copying by representatives of the Federal Trade Commission.

VII

It is further ordered, That:

A. For the purposes of this Order, every reference to the Truth in Lending Act or Regulation Z are understood to mean "as amended." "As amended" includes substantive as well as nonsubstantive (such as organizational) revisions to the current Act and Regulation.

B. Respondent shall forthwith distribute a copy of this Order to each of its operating divisions, and to all present and future personnel having policy responsibilities with respect to the subject matter of this Order, including but not limited to the manager of each central credit office and the manager of each retail store which handles its own billings or receives billing complaints.

C. Respondent shall notify the Commission at least 30 days prior to:

1. any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation; and

2. any other change in the corporation, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of this Order.

D. Respondent shall file with the Commission, within 60 days

after service of this Order, a written report setting forth in detail the manner and form in which it has complied with this Order.

E. Respondent shall file with the Commission, within 180 days after service of this Order, a written report setting forth all of the following data for each of its operating divisions:

1. the number and dollar amounts of credit balances which, pursuant to Paragraph IV of this Order, were:

a. refunded;

b. offset by further purchases made on the customer's account; and

c. retained by respondent because the customer could not be located.

2. the number of Billing Complaint Forms received from customers pursuant to Part II of this Order.

3. the number and dollar amounts of payments made to customers and credits made to customers' accounts pursuant to Part II of this Order.

4. the number of Billing Complaint Forms received from customers pursuant to Part II of this Order for which no payments were made to customers and no credits were made to customers' accounts.

5. the number of Billing Complaint Forms received from customers pursuant to Part II of this Order which indicated that a disputed account has been reported to any third party as delinquent, and the names and addresses of all third parties respondent contacted pursuant to Part II of this Order.

ATTACHMENT A TO ZALE CORPORATION ORDER

IMPORTANT NOTICE

This notice deals with mistakes we may have made in your bills since October 28, 1975. If you wrote to us about possible billing errors, we may not have handled your complaint as we should have under federal law.

If there was a mistake and we have not yet corrected it, we will do so now. We may also owe you money.

Please fill in the accompanying form. Be sure to include your name, account number and address. After you fill in the form, sign it, date it and send it back to us in the attached envelope. A copy of the form is also attached for your records. Please send copies of all letters, bills and other papers dealing with any billing errors. Keep the originals.

But be sure to send us this form even if you don't have other papers. If you can't remember the exact dates or amounts, please estimate.

1. My bill of _____ contained a mistake of
month/year
$_____which was never corrected.
The mistake was _____
_____ .

(If we made more than one mistake, list the others on another piece of paper and explain in detail. Be sure to put your name on each piece of paper.)

2. IF YOU THINK THIS MISTAKE HURT YOUR CREDIT RATING, we will tell the credit bureau that Zale settled the dispute in your favor.

Please provide as much of the following information as you can:

The city and state you lived in when the mistake on your bill occurred.

_____

The location of the Zale store of Zale credit office involved.

_____

The name and address of the credit bureau in that area, if you know.

_____

Signature X _____

Name: _____

(Please Print)

Address: _____

_____

_____

Account Number (if known) _____

Date: _____

In the Matter of

PALM BEACH COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3073. Complaint, Aug. 4, 1981—Decision, Aug. 4, 1981

This consent order requires, among other things, a Cincinnati, Ohio manufacturer of men's apparel and accessories to cease attempting to fix the resale prices at which its products are advertised or sold, through coercion or otherwise. The order also prohibits respondent from withholding any earned advertising credit or benefit from recalcitrant dealers, and bars the firm from restricting the lawful use of its trademarks and brand names. Additionally, the firm is precluded from seeking the identity of dealers who deviate from suggested resale prices, and from disseminating suggested resale prices for a period of three years, unless such prices are accompanied by a specified disclosure statement.

Appearances

For the Commission: *David M. Newman* and *Jeffrey Klurfeld.*

For the respondent: *Walter L. Landergan, Jr.,* and *Michael T. Gengler, Rich, May, Bilodeau and Flaherty,* Boston, Mass.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Palm Beach Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

Product is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by the Men's Division of respondent.

Dealer is defined as any person, partnership, corporation or firm which sells any product at retail in the course of its business.

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited

to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Palm Beach Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine with its offices and principal place of business located at 400 Pike St., Cincinnati, Ohio. Respondent is a wholly-owned subsidiary of Palm Beach Incorporated, which also has its office and principal place of business located at 400 Pike St., Cincinnati, Ohio.

PAR. 2. Respondent's Men's Division is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of men's wearing apparel and related accessories. Sales by respondent's Men's Division exceeded $60 million for fiscal 1979.

PAR. 3. Respondent maintains, and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent's Men's Division sells and distributes its products directly to more than 4,000 retail dealers located throughout the United States who in turn resell such products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent's Men's Division has for some time last past engaged in the following acts and practices:

(a) It has published lists of suggested retail prices and has circulated such lists to its dealers;

(b) It has adopted a policy that it will sell products only to dealers who abide by respondent's published suggested retail prices and will unilaterally refuse to deal with any dealer who sells any product at less than the published suggested retail price for such product; and

(c) It has regularly and systematically announced and communicated to all of its dealers the policy set forth in subparagraph (b) above.

PAR. 7. By means of the aforesaid acts and practices, respond-

ent's Men's Division, in agreement with certain of its dealers and with the acquiescence of others of its dealers, has established, maintained and pursued a planned course of action, the purpose and effect of which have been and are to fix, maintain, control or stabilize certain specified uniform prices at which products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have had and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The effects of the acts and practices of respondent's Men's Division, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Palm Beach Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business at 400 Pike St., City of Cincinnati, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For the purposes of this Order, the following definitions shall apply:

Product is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by the Men's Division of respondent.

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

Sale Period is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

It is ordered, That respondent Palm Beach Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product, or the sale period of any dealer.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price or sale period.

3. Announcing to any dealer that respondent may or will refuse to deal with any dealer who does not abide by any resale price for any product.

4. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price or sale period; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.

5. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

6. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.

7. Making any payment or granting any consideration, service or benefit to any dealer because of the resale price at which any other dealer has advertised or sold any product.

8. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

9. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

10. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

II

1. For a period of three (3) years from the date of service of this Order, orally suggesting or recommending any resale price or sale period to any dealer.

2. For a period of three (3) years from the date of service of this Order, communicating in writing any resale price or sale period to any dealer, *provided, however,* that after said three (3) year period, respondent shall not suggest any resale price or sale period on any

list, or in any advertising, book, catalogue or promotional material, unless it is clearly and conspicuously stated on each page where any suggested resale price or sale period appears, the following:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

III

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each present account of its Men's Division. An affidavit shall be sworn to by an official of the respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account of its Men's Division within three (3) years after service of this Order.

IV

It is further ordered, That respondent shall forthwith distribute a copy of this order to its Men's Division, and to present or future personnel, agents or representatives of its Men's Division having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VI

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

EXHIBIT A

Dear Retailer:

Without admitting any violation of the law, Palm Beach Company has agreed to the entry of an Order by the Federal Trade Commission regulating certain distribution practices of the Men's Division. In connection therewith, the Company is required to send you this letter describing the Order.

With respect to products of the Men's Division, the Order provides, among other things, as follows:

1. You can advertise and sell Palm Beach Company's Men's Division's products at any price you choose.

2. Palm Beach will not take any action against you, including termination, because of the price at which you advertise or sell Men's Division products.

3. Palm Beach will not suggest retail prices for any product until [3 years from the date of service of the Order].

4. The price at which you sell or advertise Palm Beach Men's Division products will not affect your right to use Palm Beach trademarks or other identification in your sale or advertising of products bearing Palm Beach trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Palm Beach for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise the Palm Beach Men's Division product.

6. If you feel that you have lost sales or been forced to mark down any Palm Beach Men's Division product because of the prices at which another retailer has sold those products, Palm Beach cannot offer any financial assistance to compensate you for such lost sales or markdowns.

If you have any questions regarding the Order or this letter, please call _____ .

_____

for Palm Beach Company,
Men's Division

367-444 O - 82 - 5 : QL 3

IN THE MATTER OF

SHERMAN A. HOPE, M.D., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9144. Complaint, July 30, 1980—Decision, Aug. 5, 1981

This consent order requires, among other things, that five individual Brownfield, Tex. physicians each cease, for the ten-year duration of the order, from taking any concerted action with another person or entity which would improperly restrict, impede or otherwise interfere with a hospital's physician recruitment program or contractual arrangement with a physician.

Appearances

For the Commission: *Benjamin I. Cohen* and *Erika R. Wodinsky.*

For the respondent: *Jim Pete Hale,* Brownfield, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents Dr. Sherman A. Hope, Dr. Morris S. Knox, Dr. Carl R. Smith, Dr. Noah W. Stone, and Dr. Harlan L. Willis ("respondents") have violated and are violating Section 5 of the Federal Trade Commission Act, and that this proceeding is in the public interest, issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. During August and September 1979, respondents were the sole active members of the medical staff of the Brownfield Regional Medical Center (the "Hospital") in Brownfield, Texas and were the only physicians in full time, active practice in Brownfield.

PAR. 2. The Hospital is operated under the auspices of the Terry County Memorial Hospital District, whose Board of Directors is popularly elected pursuant to Texas law. The Hospital is the only hospital in Terry County, Texas, and serves the county's population of approximately 16,000 persons. The next nearest hospital is approximately 35 miles away.

PAR. 3. Respondents practice in the medical specialty fields of internal medicine (Dr. Smith), surgery (Dr. Willis), and family practice (Drs. Hope, Stone, and Knox). No other specialty field is represented on the current medical staff of the Hospital. In 1979, about half of the hospital admissions of residents of Terry County

were at hospitals outside Terry County; about 80 percent of the babies born in hospitals to Terry County residents in 1979 were born in hospitals outside Terry County.

PAR. 4. In February 1979 the Hospital and the respondents agreed that additional physicians were needed in the community, and the Hospital embarked on a program to bring approximately six new physicians to Brownfield.

PAR. 5. In May 1979 the Hospital succeeded in recruiting the first new physician, an obstetrician-gynecologist. The Hospital and the new physician agreed that the Hospital would guarantee him a minimum income, would allow him to use the facilities of the Hospital, and would pay his office expenses; the physician agreed to give the Hospital a percentage of his fees not to exceed the direct cost of operating his office.

PAR. 6. In late July or early August 1979 respondents entered into a conspiracy to restrain competition in the provision of health care services in Brownfield by preventing the Hospital from recruiting and entering into contracts with new physicians, regardless of their medical qualifications, where the contract contained financial or commercial terms opposed by respondents. As part of this conspiracy, respondents agreed that they would:

(A) boycott the Hospital by concertedly refusing (1) to provide emergency room services, and (2) to perform certain administrative functions, for the Hospital;

(B) boycott physicians recruited by the Hospital by concertedly refusing to deal with such physicians; and

(C) take other actions either to coerce the Hospital into abandoning its plan to recruit and to enter into contracts with new physicians or to coerce physicians not to enter into contracts with the Hospital.

PAR. 7. The activities of respondents, in furtherance of this conspiracy, form a single and unified course of conduct and consist, in part, of the following acts:

(A) the submission to the Hospital in August 1979 of a document, signed by each respondent, threatening to cease performing emergency room service at the Hospital because of the Hospital's agreement with the new physician (exhibit A attached hereto);

(B) the submission to the Hospital in August 1979 of a document, signed by each respondent, threatening to cease performing certain necessary administrative functions at the Hospital because of the

Hospital's agreement with the new physician (exhibit B attached hereto);

(C) the submission to the Hospital in August 1979 of a document, signed by each respondent, threatening to refuse to professionally support, refer patients to, or receive referrals from the new physician (exhibit C attached hereto);

(D) informing the new physician that if he were to come to Brownfield pursuant to his contract with the Hospital, he would be making a serious financial and professional mistake, he would have his position terminated if respondents succeeded in electing a new Hospital Board of Directors, and he would probably not be accepted in the local medical society; and

(E) responding to a request for information from the Texas Medical Association by stating that the area's medical needs were being met adequately although both the Hospital and the respondents were at that time seeking to attract one or more additional physicians to Brownfield because of their belief that the area's medical needs were not, in fact, being adequately met.

PAR. 8. As a direct result of the respondents' conspiratorial acts:

(A) the Hospital ceased its physician recruiting program in September 1979;

(B) the new physician informed the Hospital, in October 1979, that he would not come to Brownfield; and

(C) the Hospital's agreement with the new physician was formally terminated in February 1980.

PAR. 9. The purpose, tendency, capacity, and effects of the respondents' conspiracy are to restrain trade and hinder competition in the provision of health care services, in the following ways, among others:

(A) physicians have been excluded from providing maternity and other health care services in Terry County;

(B) residents of Terry County are forced to travel great distances, at additional expense and inconvenience, to obtain medical care;

(C) residents of Terry County are deprived of the opportunity to choose from among a larger number of physicians;

(D) physicians are prevented from practicing medicine in Terry County on terms desired by the physicians and acceptable to the Hospital; and

(E) the Hospital is prevented from recruiting physicians on terms desired by the Hospital and acceptable to the recruited physicians.

PAR. 10. The challenged acts and practices are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, since:

(A) both the respondent physicians and the Hospital:

(i) receive substantial revenue both from the federal government, in the form of Medicare and Medicaid payments, and from private insurance companies and other private entities that pay physicians and hospitals for services rendered to patients, which money flows across state lines;
(ii) utilize or prescribe substantial quantities of drugs, medicines, surgical supplies, equipment, and other products which are shipped in interstate commerce; and
(iii) treat a substantial number of patients who come into Texas from New Mexico for medical care;

(B) the Hospital recruited additional physicians by advertising in medical journals circulated throughout the United States, and the new physician resided outside Texas when he entered into the contract with the Hospital.

PAR. 11. The conspiracy and the acts and practices of respondents alleged in Paragraphs Six and Seven constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A

RESIGNATION FROM EMERGENCY ROOM COVERAGE

WHEREAS the active medical staff of the Brownfield Regional Medical Center has served in providing professional medical care in the emergency room without pay, compensation or supplement from the tax funds of Terry County Hospital, and

WHEREAS this coverage has been provided continually since the opening of the county hospital and the creation of the Terry County Hospital District, twenty-one (21) years ago, and

WHEREAS this service has been provided without any guarantee of revenue to the physician and the medical care has been provided for all emergencies that were presented to the hospital emergency room for treatment, irregardless of race, medical situation, economic status, or being a private doctor's patient, and

WHEREAS the Brownfield Regional Medical Center has chosen to operate an emergency room along with its other departments and facilities, and has the responsibility, for equipping and manning this service, and

WHEREAS the hospital board and administrator have unilaterally decided to use hospital revenue and tax money to subsidize or employ hospital based physicians, and whereas these physicians will be in the confines of the hospital facilities,

Therefore, let it be known to the administrator, hospital board, and general public that when the hospital uses tax money to employ or subsidize hospital based physicians that the active private medical staff will no longer furnish emergency room coverage and will return this responsibility to the administrator and his employed hospital based physicians.

S. A. Hope, M.D.

Carl R. Smith, M.D.

Norris S. Knox, M.D.

Marlan L. Willis, M.D.

EXHIBIT B

RESIGNATION FROM ASSISTING WITH ADMINISTRATIVE RECORDS

WHEREAS the active medical staff has fully cooperated with the Brownfield Regional Medical Center in assisting the administrator in the voluminous administrative paper work requested by the various government agencies, and

WHEREAS the responsibility of the physician to his patient is to make proper medical records that are a necessary part of the patient's hospital care, and since the filling out of surveys, reports, utilization reviews, "on going studies," etc. and., only distracts from patient care and is primarily for administrative or financial functions, and

WHEREAS the hospital is employing part time physicians to complete some of these functions at present, and

WHEREAS the hospital is planning to use tax money and tax built facilities to subsidize and/or employ full time hospital based physicians,

Therefore, let it be resolved and known that the private physicians of the active staff of Brownfield Regional Medical Center will no longer donate their time and services to assisting the administration in completing paper work that is not directly related to patient care.

S. A. Hope, M.D.

Carl R. Smith, M.D.

Marion L. Willis, M.D.

Morris S. Knox, M.D.

Noah W. Stone, M.D.

EXHIBIT C

DECLARATION OF MEDICAL STAFF

In as much as the hospital administration has:

1. Refused to cooperate with the local medical community in recruiting physicians and
2. Entered into private and secret negotiations without any knowledge, consent or advise of local physicians in
3. Hire and employ a foreign born, foreign trained physician whose credentials and capabilities are completely unknown to us and
4. Who will be subsidized by tax money, located in a tax supported institution and whose employees will be paid by the hospital, then

WE, the private physicians of Brownfield:

1. Will not support him professionally.
2. Will not work with him medically in any capacity.
3. Will not refer patients to him or take referrals or consultations from him.
4. Will not sponsor him or vote for him to be accepted on the medical staff until such time as he has proven himself medically capable and of good moral and ethical character.

Since the hospital has employed a hospital based physician who will be tax subsidized, then we relinquish those services performed for the hospital without pay or any other form of renumeration. These are:

1. Emergency room coverage.
2. Administrative paper work.
3. Various committee assignments that have no bearing on patient care.

58 Complaint

We, as the private physicians of Brownfield, recognize that our primary responsibility is to our patients and the people of this area. We will continue to serve them to the best of our capabilities, as we are allowed to do so, under the circumstance.

We hope for a restoration of cooperation and good will between the hospital and the local medical community and will continue to work toward that end.

S. A. Hope, M.D.

Carl R. Smith, M.D.

Harlan L. Willis, M.D.

Morris S. Knox, M.D.

Noah W. Stone, M.D.

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. The respondents are individuals and medical doctors with offices located in the City of Brownfield, State of Texas at the following addresses:

Sherman A. Hope, M.D., Brownfield Medical Clinic, 901 Tahoka Road, Brownfield, Texas.
Morris S. Knox, M.D., Knox-Stone-Hurd Clinic, 706 E. Felt Street, Brownfield, Texas.
Carl R. Smith, M.D., Brownfield Medical Clinic, 901 Tahoka Road, Brownfield, Texas.
Noah W. Stone, M.D., Knox-Stone-Hurd Clinic, 706 E. Felt Street, Brownfield, Texas.
Harlan L. Willis, M.D., Brownfield Medical Clinic, 901 Tahoka Road, Brownfield, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Dr. Sherman A. Hope, Dr. Morris S. Knox, Dr. Carl R. Smith, Dr. Noah W. Stone, and Dr. Harlan L. Willis shall each cease and desist from directly or indirectly, through any agent or otherwise, taking any concerted action with any person or entity with the purpose or effect of restricting, impeding, or in any way interfering with any hospital's recruitment of or contractual arrangement with any physician by any means, including but not limited to any threatened or actual concerted refusal to:

(a) provide emergency room coverage;
(b) perform administrative functions; or
(c) professionally refer patients to, or receive referrals of patients from, any physician.

The above provisions do not prohibit respondents from:

(a) commenting on bona fide quality of care considerations relating to any physician who is recruited or employed by, or associated with, any hospital;
(b) recruiting, employing, or associating with any physician for the private practice of medicine; or
(c) contacting, reporting to, or conferring with the Texas State Board of Medical Examiners, any state or federal drug enforcement agency, and/or any other governmental body concerning a violation of law by any physician.

II.

This Order will expire ten years after the date on which it is served on respondents.

III.

It is further ordered, That each respondent shall within sixty days after service upon them of this Order file with the Commission a written report setting forth the manner and form in which the respondent has complied with this Order and that additional reports shall be filed at such other times as the Commission may by written notice to each respondent require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this Order.

IN THE MATTER OF

HOUSEHOLD FINANCE CORPORATION

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING ACT

Docket 9111. Complaint, June 13, 1978—Order, Aug. 6, 1981

This order dismisses the Commission's June 13, 1978 complaint charging one of the largest small-loan companies in the United States with violating the Truth in Lending Act (TILA). The Commission held that the company's practice of requiring customers to repay loans discharged in bankruptcy before receiving a new loan constituted "refinancing" under the TILA and therefore the amount of the discharged debt need not be disclosed as part of the "finance charge."

Appearances

For the Commission: *David G. Grimes, Jr., Rena Steinzor* and *Lawrence DeMille-Wagman.*

For the respondent: *J. Wallace Adair, Richard A. Kleine* and *R. Bruce Beckner, Howrey & Simon,* Washington, D.C., and *Richard P. McManus* and *Thomas M. Ryan,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.,* the Truth in Lending Act, 15 U.S.C. 1601 *et seq.,* and its implementing Regulation Z, 12 C.F.R. 226, duly promulgated by the Federal Reserve Board, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Household Finance Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Regulation, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Household Finance Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Prudential Plaza, Chicago, Illinois.

PAR. 2. Respondent Household Finance Corporation is now and for some time past has been engaged in the extension of consumer loans to members of the public.

PAR. 3. In the ordinary course and conduct of its business as

aforesaid, respondent regularly extends consumer credit to consumers and is a creditor as "consumer credit" and "creditor" are defined in Sections 226.2(p) and 226.2(s), respectively, of Regulation Z.

PAR. 4. Respondent, in the ordinary course of its business, extends and for some time since July 1, 1969, has extended loans to consumers, some of whom subsequently file bankruptcy petitions prior to full repayment of their debt to respondent. Such consumers are duly adjudged as bankrupts pursuant to the Bankruptcy Act, 11 U.S.C. 1 *et seq.,* and are released from any legal obligation to repay discharged debts, including debts to respondent. [These consumers are hereinafter sometimes referred to as "discharged debtors".] [2]

PAR. 5. In many instances, respondent solicits discharged debtors offering them specific extensions of new credit on the condition that the discharged debtor reaffirm his or her discharged debt to respondent. When a discharged debtor, who has been solicited by respondent or who otherwise requests a specific subsequent extension of credit from respondent, enters into a subsequent transaction, respondent requires the debtor to sign a contract which reaffirms all or part of his or her discharged debt and obligates the discharged debtor to repay that amount plus any new loan advanced. Finance charges are imposed on the sum of the reaffirmed debt and the new loan. Respondent does not extend credit in the form of new loans to such consumers without their reaffirmation of discharged debt. The amount of debt reaffirmed therefore represents a charge which is payable directly or indirectly by the borrower as an incident to or a condition of the extension of credit and constitutes a cost of credit and is a finance charge as "finance charge" is defined in Sections 226.2(w) and 226.4(a) of Regulation Z.

PAR. 6. In its disclosures required by the Truth in Lending Act and Regulation Z for the loans described in Paragraph Five above, respondent treats the reaffirmed debt as part of the credit of which the consumer will have actual use and not as a "finance charge" on the new loan transaction. Respondent includes the reaffirmed debt in its disclosure of the "amount financed" on the new loans. Respondent, in connection with these loans thereby: (1) fails to accurately compute and disclose the finance charge, as required by Section 226.8(d)(3) of Regulation Z; (2) fails to compute and disclose the annual percentage rate, as "annual percentage rate" is defined in Sections 226.2(g) and 226.5 of Regulation Z, accurately to the nearest quarter of one percent as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z; and (3) fails to accurately compute and disclose the amount financed as required by Section 226.8(d)(1) of Regulation Z.

PAR. 7. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failure to comply with the provisions of Regulation Z constitutes a violation of that Act and, pursuant to Section 108 thereof, respondent has engaged in unfair or deceptive acts and practices in violation of the Federal Trade Commission Act, as amended.

INITIAL DECISION

BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

MARCH 16, 1979

Allegations of Complaint

The complaint, which was served on respondent Household Finance Corporation (Household Finance) on July 10, 1978, charged respondent with having violated the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, the Truth in Lending Act, 15 U.S.C. 1601, *et seq.*, and its implementing Regulation Z, 12 C.F.R. 226. According to the allegations, Household Finance has been approached for new loans by persons who have had prior debts owed to it discharged in bankruptcy. In such cases, according to the complaint, where the discharged debtor was [2]otherwise eligible for a new loan, Household Finance would grant such a loan provided the discharged debtor would sign a contract which reaffirmed all or part of the discharged debt and obligated him or her to repay to Household Finance the amount of that debt plus the amount of the new loan advanced.

The complaint charged that Household Finance improperly treated the reaffirmed debt as part of the credit granted to the borrower and of which he or she would have actual use, rather than as a "finance charge" on the new loan transaction, in the disclosures required by the Truth in Lending Act and Regulation Z, promulgated by the Federal Reserve Board to implement the Act. In other words, it was alleged that Household Finance unlawfully included the reaffirmed debt, previously discharged in bankruptcy, in the disclosure to the borrower of the "amount financed" rather than in the "finance charge."

The complaint challenged this procedure alleging that the amount of the reaffirmed debt "represents a charge which is payable directly or indirectly by the borrower as an incident to or a condition of the extension of credit and constitutes a cost of credit and is a "finance

charge" as "finance charge" is defined in Regulation Z. The complaint further charged that Household Finance, in connection with such loans, by including the amount of the reaffirmed debt in the disclosure of the "amount financed" rather than in the disclosure of the "finance charge":

. . . (1) fails to accurately compute and disclose the finance charge, as required by Section 226.8(d)(3) of Regulation Z; (2) fails to compute and disclose the annual percentage rate, as "annual percentage rate" is defined in Sections 226.2(g) and 226.5 of Regulation Z, accurately to the nearest quarter of one percent as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z; and (3) fails to accurately compute and disclose the amount financed as required by Section 226.8(d)(1) of Regulation Z.

Procedural History

Respondent Household Finance's answer was filed August 7, 1978. A prehearing conference was scheduled for September 19 by Judge Teetor to whom this proceeding [3]was originally assigned. Judge Teetor, however, disqualified himself on September 7 and the prehearing conference of September 19 was cancelled. The undersigned was then assigned to this matter and rescheduled the conference for October 12.

At this conference an effort was made to secure from both sides a stipulation of facts inasmuch as this proceeding appeared to involve principally an issue of law relating to the application of Regulation Z and the Truth in Lending Act. The parties were directed to attempt to reach such a stipulation by November 10. In the meantime complaint counsel filed a request for admission of facts and genuineness of documents and, after receiving respondent Household Finance's response thereto, a motion that the sufficiency of such response be determined by the law judge. A second request for admission of facts and genuineness of documents was filed, but was withdrawn by complaint counsel on agreement by both sides to a "Statement of Stipulated Facts."

At a second prehearing conference held December 19 the stipulation of facts was taken up by the law judge and discussed with the parties. Neither side wishing to offer anything in evidence in addition to the stipulation, it was determined that no evidentiary hearings were required and that no further procedural steps were necessary other than the submission by both sides of proposed findings and supporting memoranda. On December 20 an order was issued based on the preceding day's conference accepting the stipulation, closing the record for the reception of evidence and establishing a briefing schedule. February 2, 1979 was established as a date for the submission of findings and briefs, and February 16,

1979, for the filing of any replies by each side to the filings of the other.

Complaint counsel and counsel for respondent Household Finance have agreed that the "Statement of Stipulated Facts" is to be the sole statement of the facts to be used by any party in this proceeding. Counsel for both sides have also agreed that nothing in the stipulation can be used or considered as an admission by respondent in any other proceeding, with the exception of a proceeding brought by the Commission pursuant to Section 19 of the Federal Trade Commission Act as a result of an administrative decision in this proceeding, Docket No. 9111, which is based on facts stated in the stipulation and found herein. Respondent, furthermore, does not agree or admit that the Commission has authority [4]to institute a proceeding under Section 19 of the Federal Trade Commission Act or otherwise obtain restitution against respondent in connection with this proceeding.

Findings of Fact

Except for a few grammatical changes, the joint "Statement of Stipulated Facts" is incorporated herein as the following "Findings of Fact," each numbered finding corresponding to the same numbered paragraph of the stipulation:

1. Respondent Household Finance Corporation is a corporation organized under the laws of the State of Delaware. Its principal office and place of business is located at 2700 Sanders Road, Prospect Heights, Illinois.

2. Respondent is now and for some time in the past has been engaged in the extension of consumer loans to members of the public.

3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends consumer credit to consumers and is a creditor as "consumer credit" and "creditor" are defined in Sections 226.2(p) and 226.2(s), respectively, of Regulation Z, 12 C.F.R. 226.

4. Since July 1, 1969, although not a substantial number of respondent's total customers, a substantial number of consumers to whom respondent has extended loans have, prior to full repayment of their indebtedness to respondent, filed petitions in bankruptcy.

5. Of those consumers who filed petitions in bankruptcy as described in Finding 4, a substantial number were subsequently adjudged bankrupts and granted discharges in bankruptcy in accordance with the provisions of the Bankruptcy Act, 11 U.S.C. 1, *et seq.*, with respect to indebtedness to respondent and others.

6. In a substantial number of cases after notification that the petition in bankruptcy had been filed, and in a substantial number of cases after a final discharge in bankruptcy had been granted, respondent has contacted consumers described in Findings 4 and 5 [5]and informed them that upon reaffirmation of a part or all of their discharged debts to respondent, and if otherwise eligible for credit, it would reestablish their credit with respondent and shortly thereafter grant them new loans.

7. In a substantial number of cases after notification that the petition in bankruptcy had been filed, and in a substantial number of cases after a discharge in bankruptcy had been granted, consumers described in Findings 4 and 5 have sought new loans from respondent.

8. During their negotiations concerning new loans, respondent and most of the consumers described in Findings 4, 5, 6 and 7 discussed one or more of the following: (a) the consumer's desire to retain property pledged as security by the consumer with respect to the indebtedness owed to the respondent; (b) the release of a co-maker's obligation to pay the consumer's indebtedness to respondent; (c) resolution of litigation pending in bankruptcy court concerning the indebtedness of the consumer; (d) reestablishment of the consumer's credit with respondent.

9. During their negotiations concerning new loans, respondent and the consumers described in Findings 4, 5, 6 and 7 discussed the reaffirmation of part or all of the consumer's debt to respondent which had either been discharged by the bankruptcy proceeding or was scheduled as a debt in the bankruptcy proceeding at the time of the negotiations.

10. In a substantial number of instances since July 1, 1969, respondent has obtained reaffirmations from the consumers described in Findings 4, 5, 6 and 7 of part or all of their indebtedness to respondent which had been discharged in bankruptcy or which was scheduled as a debt in the bankruptcy proceeding at the time of the reaffirmation. Most of those consumers have reaffirmed their debts to respondent for one or more of the following reasons: (a) to retain property pledged as security by the consumer in connection with the indebtedness owed to respondent; (b) to secure the release of a co-maker's obligation to repay the indebtedness of the consumer; (c) to settle bankruptcy court litigation concerning the indebtedness of the consumer; (d) to reestablish credit with respondent. Such consumers must reaffirm part or all of their debts to respondent before obtaining new loans from respondent. [6]

11. Since July 1, 1969, respondent's policy and usual and custom-

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ary practice has been that part of any new loan from respondent to the consumers described in Findings 4, 5, 6 and 7 must be used to repay part or all of their debts to respondent which had been discharged in bankruptcy or which were scheduled as a debt in a bankruptcy proceeding at the time of the new loan.

12. Since July 1, 1969, respondent's policy and usual and customary practice has been that during the negotiations concerning new loans and before consumers described in Findings 4, 5, 6 and 7 agree to reaffirm debts to respondent, its employees inform such consumers that such reaffirmation is necessary to reestablish their credit with respondent and that part of any new loan from respondent must be used to repay part or all of their debt to respondent which had been discharged in a bankruptcy proceeding or which was scheduled as a debt in a bankruptcy proceeding at the time of the negotiations.

13. Since July 1, 1969, whenever a consumer has agreed to pay all or a portion of a debt scheduled or discharged in a bankruptcy proceeding with part of the principal amount of the new indebtedness, respondent has imposed finance charges on those portions of the principal amount of the new indebtedness which are applied to repayment of part or all of the reaffirmed debt and the amount of new money paid to the consumer. The term "principal amount of the new indebtedness" shall mean the total amount of money the consumer agrees to pay respondent which includes (a) the amount of the new indebtedness which is applied to the payment of part or all of the reaffirmed debt; (b) the amount of new money paid to the consumer; and (c) the finance charge imposed on (a) and (b) above.

14. Since July 1, 1969, whenever a consumer has agreed to reaffirm and pay all or a portion of a debt scheduled or discharged in a bankruptcy proceeding with part of the principal amount of the new indebtedness, respondent's policy and usual and customary practice regarding the Truth in Lending disclosure statement furnished to the consumer in connection with the new indebtedness has been that: [7]

a. The amount of the reaffirmed debt paid from the principal amount of the new indebtedness is disclosed as part of the amount financed;

b. The amount of additional credit extended is disclosed as part of the amount financed;

c. The amount of the reaffirmed debt paid from the principal amount of the new indebtedness is not included in the finance charge disclosed; and

d. The annual percentage rate disclosed is computed by relating the disclosed finance charge to the disclosed amount financed.

15. With respect to the disclosure statements described in Finding 14, if the amount of the reaffirmed debt repaid from the principal amount of the new indebtedness were included in the finance charge disclosed, and removed from the amount financed disclosed, and if the annual percentage rate were recomputed on the basis of the amended finance charge and amount financed, the annual percentage rate would be increased by more than one-quarter of one percent, from what appeared in the disclosure statements described in Finding 14.

16. Prior to on or about July 1, 1977, respondent did not offer consumers the right to rescind contracts which reaffirmed debts previously discharged in bankruptcy. Respondent required those consumers to sign a loan agreement to repay the principal amount of the new indebtedness, part of which was used to settle their reaffirmed debt and part of which was new money paid to the consumers.

17. Beginning on or about July 1, 1977, to the present, respondent has, as a matter of usual and customary practice, presented consumers who reaffirmed debts previously discharged in bankruptcy and repaid them from the principal amount of the new indebtedness a *Statement of Rights, Agreement and Cancellation Notice,* a copy of which is Attachment B set out herein.

18. The two-page document set out herein as Attachment A is a true, correct copy of a genuine original memorandum which was prepared at respondent's home office on or about June 29, 1977. [8]

19. Attachment B is a true, correct copy of Form 3, referred to in Attachment A.

20. Attachments A and B were distributed by respondent to its employees identified in Attachment A as "U.S. Managers" on or about June 29, 1977.

21. Respondent's home office directed respondent's U.S. Managers, on or about June 29, 1977, that the procedures described in Attachment A were to be followed, as applicable, in dealings with consumers who had been discharged in bankruptcy from some indebtedness to respondent.

22. Respondent has not rescinded or modified Attachments A and B.

23. Since on or about June 29, 1977, as a matter of usual and customary practice, the procedures described in Attachment A have been followed, as applicable, in dealings with consumers who have

been discharged in bankruptcy from some indebtedness to respondent.

24. The policy and customary practices of respondent as set forth in Findings 4 through 7 and 11 through 15 are the policy and customary practices of many of respondent's competitors, including its competitors who are not within the jurisdiction of the Federal Trade Commission.

25. Since July 1, 1969, the policies and customary practices of respondent and its competitors, as described herein, have not been challenged by the Federal Trade Commission or the Federal Reserve Board in any formal proceeding. [9]

HOME OFFICE MEMORANDUM

To All U.S. Managers Date June 29, 1977

Subject: Bankruptcy Refinancing Agreements

As a result of a recent occurrence in New York, it is desirable to more fully implement our policy with respect to bankruptcy refinancing agreements. We must make certain that all bankrupt customers fully understand and freely exercise their rights with respect to such agreements. Accordingly, a notice and cancellation procedure is established.

In the absence of a restraining order, bankrupt customers may be contacted to discuss collateral or to discuss reaffirmation. If the bankrupt asks about obtaining a new loan, this possibility may be discussed if the bankrupt is otherwise eligible for additional credit. In any discussion concerning reaffirmation or a new loan the bankrupt must be advised that there is no legal obligation to repay the bankrupt account balance, and that part of any new loan must be used to settle the discharged debt but the amount so used is negotiable.

At the closing of any loan in which part of the proceeds is used to settle a bankruptcy discharged debt, and before the loan papers are signed, the following procedures must be followed:

1. Complete Form 3 (example attached) to show the Amount Financed of the new loan, the amount applied to the discharged debt, and the amount actually disbursed, including the premium charge for any credit insurance elected;

2. Have the customer read the Form 3 and sign it;

3. Have the other loan documents signed and disburse the loan proceeds; and,

4. Give the Customer Copy of Form 3 to the borrower and retain HFC's File Copy with the legals.

DO NOT STAMP THE OLD PAPERS PAID OR CANCELLED OR RETURN THEM TO THE CUSTOMER, NOR RELEASE ANY SECURITY INTEREST AT THIS TIME.

If the discharged debt is an open account the new loan must be coded as a "NEW".

If the discharged debt is a Bad Debt account, the new loan must be coded as a "FOR". In both cases the amount applied to the discharged debt would be coded as a counter payment.

(Attachment A, page 1)

All U.S. Managers -2- June 29, 1977

If the CANCELLATION NOTICE is not received within ten (10) calendar days plus three (3) business days after the new loan was closed, mark the previous account's papers in the normal way and return them to the customer.

If the CANCELLATION NOTICE is received within ten (10) calendar days plus three (3) business days, the amount applied to the discharged debt must be credited to the new loan as follows: Void the payment that was applied to the discharged balance and apply that amount as a counter payment to the new loan.

Retain the discharged account's documents as if the new loan had not been made. Payments on the new loan must continue to be made as scheduled, disregarding the credit to the new loan that was applied; i.e., the credit to the new loan must not be considered as paying it in advance.

Offices serving District of Columbia, Iowa, New Jersey and West Virginia must apply the special restrictions listed in Section 6-7 of the Collection GIM to bankruptcy refinancing agreements as well as reaffirmations. This instruction is sent to New York offices for information only and those branches should continue to follow the special instructions previously issued.

Section 6-7 of the Collection GIM will be expanded to include the notice and cancellation procedure at the time of its next reprinting. A supply of Form 3 will be shipped under separate cover. If you have any questions, please contact your District Manager.

W. J. D. Miller
Vice President
Administration - Operations

WJDM:kw
Attachment

(Attachment A, page 2)

STATEMENT OF RIGHTS

1. To obtain a new loan you will be required to repay all or part of your outstanding debt to HFC that was discharged in bankruptcy.

2. Your discharge in bankruptcy has fully released you from any legal obligation to repay any part of your outstanding debt to HFC.

3. You may bargain with HFC on the amount of the new loan to be paid towards your old loan.

4. You may cancel within 10 days your agreement with HFC to apply an agreed amount to your old loan.

5. If you decide, within 10 days, to cancel your agreement with HFC to apply an agreed amount to your old loan, tear off, date, sign and mail the bottom of this notice, below the dotted line, to HFC at this branch office address.

6. If you do cancel, the amount applied to your old loan will be credited in full to your new loan, but you are required to meet your new loan payments as scheduled.

7. If you do not cancel within 10 days, the note representing your obligation under the old loan will be marked paid and cancelled and promptly returned to you by HFC.

AGREEMENT

HFC and I have agreed that HFC will:

1. Make me a new loan in the Amount Financed of $_____;

2. Apply to my old loan that was discharged in bankruptcy $_____; and,

3. Disburse to me or on my behalf from the new loan $_____.

By signing this agreement, I acknowledge that I have read and understood its terms and that I have received a copy. I understand I am under no legal obligation to enter into such an agreement.

Date _____ Signature _____

Witness, HFC Representative _____

CANCELLATION NOTICE

TO: HOUSEHOLD FINANCE CORPORATION

Address: _____

City: _____ State: _____ Zip Code: _____

I hereby cancel my agreement with HFC to apply an agreed amount to my old loan.

Date _____ Signature _____

FORM 7 CUSTOMER COPY (Attachment B)

[12]*Discussion*

The question presented in this proceeding is whether, under the stipulated facts including Attachments A and B, the amount of a reaffirmed debt previously discharged in bankruptcy is a cost of credit which must be disclosed to the borrower as part of the "finance charge" under the Truth in Lending Act and its implementing Regulation Z, rather than listed as part of the "amount financed," as has been the practice of respondent Household Finance. The Truth in Lending Act is the short title for Title 1 of the Consumer Credit Protection Act, legislated by Congress in 1968. 15 U.S.C. 1601, *et seq.* Pursuant to Section 1605(a) of the Act, as amended, the term "finance charge" is defined as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit . . ." Section 1604 provides that the Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of the Truth in Lending Act. Pursuant to this mandate the Board issued Regulation Z, effective July 1, 1969, and amended October 28, 1975.

Regulation Z defines the term "finance charge" as "the cost of credit determined in accordance with Section 226.4" of the regulation. 12 C.F.R. 226.2(w). Section 226.4 provides that:

> . . . the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party . . . .

Regulation Z enumerates several types of charges which must be included by the lender within the "finance charge," as well as certain charges excludable from the "finance charge." 12 C.F.R. 226.4(a)-(b). The import of this enumeration of charges to be included or excluded from the "finance charge" in the required disclosure statement is that if the payment is required by the lender as an incident to or a condition for granting the loan it must be listed as part of the "finance charge." [13]

Where insurance, for example, is required by the lender as a condition for the loan and the borrower must pay the premium, the latter must be included within the "finance charge." 12 C.F.R. 226.4(a)(5). On the other hand, if the borrower already owns a policy of insurance which the creditor requires to be assigned to him as a condition for the loan, the insurance is not written "in connection with" the loan transaction (provided the policy was not purchased

for use with the credit transaction), and premiums for such insurance are not "finance charges." 12 C.F.R. 226.4(a)(5) n. 3. Similarly, charges in connection with a checking account which involve credit extension must be included in the "finance charge" to the extent they exceed charges that a customer is required to pay "in connection with such an account where it is not being used to extend credit." 12 C.F.R. 226.4(a)(5) n. 2.

Appendix A of Regulation Z reiterates that the "finance charge" is "the total of all costs which . . . [a] . . . customer must pay, directly or indirectly, for obtaining credit." Appendix A further notes that some costs which would be paid by the borrower in any event "if credit were not employed" may be excluded. In sum, costs payable for obtaining a loan are part of the "finance charge," and costs which the borrower would have to pay regardless of whether or not a loan were obtained are not part of the "finance charge."

The purpose of the Truth in Lending Act is to assure that every consumer who has need for credit is given meaningful information of the true cost of that credit enabling the consumer to compare better the credit terms offered from various sources and thereby avoid the uninformed use of credit. 15 U.S.C. 1601(a); *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 363–65 (1972); *Joseph* v. *Norman's Health Club, Inc.,* 532 F.2d 86, 90 (8th Cir. 1975). This is to be accomplished by stating the cost of credit by items and in dollars in a disclosure of the "finance charge" to be provided every customer seeking consumer credit.

The discharge of a debt in bankruptcy releases a debtor from any legal compulsion to repay the debt. A discharge in bankruptcy enjoins all creditors whose credit extensions have been discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt. 11 U.S.C. 32(f). The foregoing provides: [14]

> (f) An order of discharge shall –
>
> (1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following [debts] . . . and
>
> (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

A debt discharged in bankruptcy, therefore, is uncollectable by legal process although it is not forgiven or cancelled. *Wagner* v. *United States,* 573 F.2d 447, 453 (7th Cir. 1978); *Binnick* v. *Avco Financial Services of Nebraska,* 435 F. Supp. 359, 363 (D. Neb. 1977). *Collier on*

Bankruptcy, Section 17.33 (14 Ed.), states "The general rule is that a discharge affects only the remedy of the creditor and the obligation itself is not cancelled."

Since neither forgiven nor cancelled, a discharged debt may be rendered legally enforceable again if reaffirmed by the discharged debtor. According to *Collier, supra:*

> The law in the various states governs this matter, and it is generally agreed that the bar of a discharge may be waived by the making of a new promise. In reaching this decision, the courts have employed various theories; some courts have found consideration for the new promise in the form of a past legal obligation plus a present moral obligation, while other courts have declared that no new consideration is necessary to support the waiver.

Accordingly, when a debtor reaffirms, promising to pay to Household Finance a debt discharged in bankruptcy in order to obtain a new loan, a legally enforceable obligation against him or her is created which previously did not exist. Respondent has cited many state court cases to this effect (RPF, pp. 13–16 and Appendix to RPF Table of Authorities). [15]See also *Kessler* v. *Department of Public Safety,* 369 U.S. 153, 169–70 (1962); *Zavelo* v. *Reeves,* 227 U.S. 625, 629 (1913); *Girardier* v. *Webster College,* 563 F.2d 1267, 1272 (8th Cir. 1977); *Zabella* v. *Pakel,* 242 F.2d 452, 454 (7th Cir. 1957); *In re Innis,* 140 F.2d 479, 481, (7th Cir. 1944), *cert. denied,* 322 U.S. 736 (1943); *Shepherd* v. *McDonald,* 61 F. Supp. 948, 953 (D. Ore. 1945), *rev'd on other grounds,* 157 F.2d 467, 468 (9th Cir. 1946), *cert. denied,* 329 U.S. 802 (1947). The Supreme Court, in *Kessler,* stated, 369 U.S. at 170:

> . . . a moral obligation to pay the debt survives discharge and is sufficient to permit a State to grant recovery to the creditor on the basis of a promise subsequent to discharge, even though the promise is not supported by new consideration . . .

A debtor, after reaffirmation, can thus be forced through legal process to pay money which, until reaffirmation, Household Finance could not collect through legal process. Under these circumstances, the additional legally enforceable liability of a borrower, arising from reaffirmation, to pay all or part of a previously discharged debt is clearly a "cost" of a new loan granted by Household Finance.

This "cost" of credit, furthermore, is exacted as an incident to or a condition for the grant of credit. Unless an applicant for a loan who has had a prior debt to Household Finance discharged in bankruptcy, in whole or in part, will reaffirm all or part of the prior discharged debt, Household Finance will not grant a new loan. See Finding 10. The "Statement of Rights, Agreement and Cancellation Notice" (Attachment B) leaves no doubt, telling borrowers clearly that "[t]o obtain a new loan you will be required to repay all or part

of your outstanding debt to HFC that was discharged in bankruptcy." See also Finding 11.

Although the Act itself is unambiguous on the point, it has been specifically held that a tying relationship between the imposition of a charge and the extension of credit renders the former a "finance charge." *Mondik* v. *DiSimo,* 386 F. Supp. 537 (W.D. Pa. 1974). It has been held that the assumption by a borrower of the preexisting debt of another as a condition for obtaining a loan results in a "cost" or "charge" which must be disclosed in the "finance charge." *Campbell* v. *Liberty Financial Planning, Inc.,* 422 F. Supp. 1386 (1976). No reason would seem to exist for [16]a different result when a borrower is required to reaffirm his own debt previously discharged in bankruptcy. In both cases the borrower is saddled with a legally enforceable monetary obligation which he or she did not previously have as a condition for being granted new credit. Further precedent can be found in cases involving other kinds of costs, for example, unearned non-rebated insurance premiums, *Ives* v. *W.T. Grant Company,* 522 F.2d 749, 760 (2nd Cir. 1975), *Welmaker* v. *W.T. Grant Company,* 365 F. Supp. 531, 538–39 (D. Ga. 1973), mandatory service contract, *Carney* v. *Worthmore Furniture, Inc.,* 561 F.2d 1100, 1103 (4th Cir. 1977), notary fees not mandatory under state law, *Buford* v. *American Finance Co.,* 333 F. Supp. 1243, 1247 (D. Ga. 1971), but see *George* v. *General Finance Corp of Louisiana,* 414 F. Supp. 33, 35 (E.D. La. 1976), delivery charges, *Mondik* v. *DiSimo, supra,* discounts on notes, *Joseph* v. *Norman's Health Club, Inc., supra.* In the opinion of the undersigned, a discharged debt reaffirmed to obtain a new loan is a cost of credit and must be disclosed as such to the borrower as part of the "finance charge."

Respondent's Contentions

Household Finance denies that the amount of a discharged debt reaffirmed by a recipient of a new loan must be disclosed as part of the "finance charge." Respondent argues that because a discharge in bankruptcy does not wipe out the debt which continues to exist, and because reaffirmation is simply an agreement to pay an existing obligation which is enforceable without further consideration, reaffirmation cannot be a "charge" paid by a consumer to obtain a new loan (RPF, pp. 11–18; RRB, pp. 11–14).* Household Finance further contends that because there is already an existing moral obligation, the agreement to reaffirm is sufficient to hold the consumer legally

* Respondent's proposed findings are abbreviated "RPF" and respondent's reply brief is abbreviated "RRB."

liable to pay the reaffirmed debt without additional consideration or any new written instrument, and thus reaffirmation is wholly "independent" of a "subsequent extension of credit," *i.e.,* a new loan, and is not "imposed" on the consumer (RPF, p. 21; RRB, pp. 21–28). Since the borrower has the right to cancel within 10 calendar days, Household Finance argues that it has not "imposed [any] requirement on the consumer to pay the amount used to settle the reaffirmation" and that, for this reason also, there [17]has been no "charge" (RPF, p. 23). Adding to the argument that nothing has been "imposed" on the customer, respondent asserts that "most" borrowers reaffirm for reasons wholly unrelated to credit extensions or simply to "reestablish credit" and, therefore, reaffirmation is neither "imposed" nor "incident to the extension of credit" (RPF, p. 24).

As stated earlier, the purpose of the Truth in Lending Act is to ensure that consumers of credit receive meaningful disclosures of the costs or charges for credit. 15 U.S.C. 1601. The Act must be given a broad, liberal construction, not a technical, narrow one. *Sellers* v. *Wollman,* 510 F.2d 119 (5th Cir. 1975); *Eby* v. *Reb Realty, Inc.,* 495 F.2d 646 (8th Cir. 1974); *Pinkett* v. *Credithrift of America, Inc.,* 430 F. Supp. 113 (D. Ga. 1977); *Gerasta* v. *Hibernia National Bank,* 411 F. Supp. 176 (D. La. 1976). The word charge means any pecuniary burden, expense or obligation. *Garza* v. *Chicago Health Clubs, Inc.,* 347 F. Supp. 955 (N.D. Ill. 1972); *Meyers* v. *Clearview Dodge Sales, Inc.,* 384 F. Supp. 722 (E.D. La. 1974). The assumption of a legally enforceable obligation to pay a discharged debt in order to secure new credit, where before such assumption there was at most a moral obligation unenforceable by legal process, is clearly a cost or charge. The borrower must now pay something which before reaffirmation he or she could not have been made to pay. Reaffirmation of a discharged debt is a cost or a charge within the meaning of the Truth in Lending Act notwithstanding the continued existence of the debt after discharge and a "moral obligation" to pay.

The fact that a borrower may have his or her own reasons for reaffirming a discharged debt does not mean that reaffirmation is not imposed by Household Finance. The statement of Household Finance to borrowers informing them that to obtain a new loan they are required to repay all or part of the debt discharged in bankruptcy refutes any contention that Household Finance does not impose reaffirmation. See Attachment B. See also Findings 10, 11 and 12. Even if, apart from Household Finance's requirement, debtors reaffirm their discharged debts to keep property pledged as security or to release co-makers, or the like, the plain fact is that they would not get a new loan if they refused to reaffirm. And, they are fully

advised of this condition by respondent when they apply for a new loan. Finding 12. The realities of the situation dictate that the prospect of a new loan must be a factor in motivating many borrowers to reaffirm discharged debts. [18]

Nor does the right of a borrower to rescind the reaffirmation of the discharged debt within 10 calendar days mean that there has been no imposition of a charge incident to the extension of credit. It should be noted, in connection with this argument, that prior to July 1, 1977, Household Finance did not offer borrowers the right to rescind an agreement to reaffirm debts previously discharged in bankruptcy. Respondent's argument on this point is not applicable to its failure to disclose the amount of the reaffirmed debt as part of the "finance charge" prior to that date. With respect to transactions subsequent to July 1, 1977, Section 1601 of the Truth in Lending Act requires that there be a full disclosure of credit terms to a borrower *before* the transaction is consummated so that there may be a comparison of the terms available from various sources and uninformed use of credit may be avoided. *White* v. *Arlen Realty & Development Corp.,* 540 F.2d 645 (4th Cir. 1974); *Johnson* v. *McCrakin-Sturman Ford, Inc.,* 527 F.2d 257 (3rd Cir. 1975); *Philbeck* v. *Timmers Chevrolet, Inc.,* 499 F.2d 911, *rehearing denied,* 502 F.2d 1167 (5th Cir. 1974). At the time a new loan is negotiated reaffirmation has taken place, a cost or charge has been placed on the borrower and the disclosures required by the Truth in Lending Act are required to have been made.

Determinations that a reaffirmed debt is principal rather than interest in actions under state usury laws do not mean that the amount of the reaffirmed debt is not a cost of credit which must be disclosed under the Truth in Lending Act as a part of the "finance charge" (RPF, pp. 17–18). The term "finance charge" under Section 1605(a) of the Act includes not only interest but many other charges for credit. *H.R. Report* No. 1050, 90th Cong. 2nd Sess. (1967); *Joseph* v. *Norman's Health Club, Inc.,* 532 F.2d at 93. In *Campbell* v. *Liberty Financial Planning, Inc.,* 422 F. Supp. at 1391, the District Court held that the debt or another assumed by the borrower, although not interest, was a charge which had to be disclosed as a "finance charge" under the Truth in Lending Act.

Respondent argues, as already mentioned, that the requirement for reaffirmation of a discharged debt by an applicant for a new loan is not "incident to the extension of credit" because the reaffirmation transaction and the grant of a new loan are "wholly independent" (RPF, pp. 21, 24–25; RRB, pp. 21–28). In the instant setting this [19] argument is little more than the kind of "semantic posturing"

referred to by the court in *Campbell* in rejecting the claim that the borrower's assumption of the balance of his mother's discharged debt was a separate transaction not incident to the grant of the borrower's own loan. The contention that reaffirmation is a transaction wholly independent of the grant of a new loan is negated by respondent's straightforward advice to borrowers tying a new loan to the repayment of all or part of the outstanding debt to HFC that was discharged in bankruptcy. Attachment B; Findings 10–12.

Respondent contends (RPF, p. 22) that reaffirmed debts do not constitute a "finance charge" because they are not similar to the types of charges enumerated in Section 1605(a) of the Truth in Lending Act. That section, however, makes no pretense of being an exhaustive listing of finance charges. Nor is there any suggestion that every finance charge must be similar in nature to those listed. Additionally, it has been held that no charge other than those specifically listed in Section 1605(d) may be excluded from "finance charge" unless the exclusion "is approved by the [Federal Reserve Board] by regulation." 15 U.S.C. 1605(d)(4). In *Buford* v. *American Finance Company,* 333 F. Supp. 1243, 1247 (N.D. Ga. 1971), the court stated that "only those charges specifically exempted from inclusion in the 'finance charge' by statute or regulation may be excluded from it."

Respondent asserts that reaffirmation of a discharged debt as an incident to the grant of a new loan is governed by Section 226.8(j) of Regulation Z which relates to "Refinancing, consolidating or increasing" an existing extension of credit.* (RPF, pp. 25–26). Section 226.8(j) states: [20]

> *Refinancing, consolidating, or increasing.* If any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, such transaction shall be considered a new transaction subject to the requirements of this part . . . .

Reaffirmation in whole or in part of a discharged debt in order to obtain a new loan does not constitute a "refinancing" of the old, discharged debt. Nor does it constitute the "consolidating" or "increasing" of a former extension of credit. It is not a financing "again or anew" or a "reorganization" of the debtor's finances. See *Webster's New International Dictionary,* 2nd Ed. Where no new loan is involved in the arrangement between a discharged debtor and his or her creditor, whereby a discharged debt is reaffirmed, the

* As already pointed out, a debt discharged in bankruptcy cannot be collected by legal process and any judgment respecting such debt is void as a determination of the personal liability of the bankrupt. 15 U.S.C. 32(f). A discharged debt, thus, has no enforceability by legal process. Following this reasoning, it can be argued that a discharged debt is not an "existing extension of credit" within the meaning of 12 C.F.R. 226.8(j).

disclosure requirements of the Truth in Lending Act and Regulation Z are irrelevant to this proceeding (RRB, pp. 14–18). As is clear from all that has been written hitherto, this proceeding concerns the disclosure requirements applicable in connection with a *new* loan to a discharged debtor who is required to repay all or part of the outstanding debt to Household Finance that was discharged in bankruptcy.

Respondent argues that requiring the inclusion of the amount of any reaffirmed debt in the disclosure of the "finance charge" would result in consumer confusion and would make comparison shopping between respondent and its competitors more, not less, difficult, contrary to the goals of the Truth in Lending Act. To prove this argument, Household Finance presents a hypothetical situation (RPF, pp. 30–32) involving a consumer who has borrowed money from respondent by pledging his automobile as security, and has thereafter gone through bankruptcy, having his or her debts discharged including $500 owed to respondent. Subsequently, the discharged debtor wishes to keep his car upon being told by Household Finance that "it will repossess the automobile" and also desires to borrow "another $600 to pay his bankruptcy attorney" (RPF, p. 31). Respondent then depicts the disclosures under the "finance charge" and "annual percentage rate" when the consumer borrows from Household Finance a new [21]$600 to pay his lawyer and reaffirms the discharged $500 (borrowing an additional $500 to pay that also), and where the consumer borrows $1100 from a rival loan company and no reaffirmation is involved. Respondent shows that the inclusion in its "finance charge" disclosure to the borrower of $500 of discharged debt distorts the "annual percentage rate" so that the borrower appears to be receiving a better deal from Household Finance's competitor than from Household Finance, although the truth is to the contrary. This situation, of course, is only hypothetical, and may have little or no relation to reality. The fact that respondent can construct hypothetical cases where inclusion of a reaffirmed debt in the "finance charge" results in a distortion of the "annual percentage rate," when compared with an equivalent amount of a new loan by a competitor involving no reaffirmation, does not mean that the true cost of credit need not be disclosed by Household Finance as required by the Truth in Lending Act and Regulation Z. As emphasized earlier, reaffirmation of a discharged debt under the circumstances of this case is an incident to and a condition of the extension of credit. As such, the reaffirmation must be disclosed to the borrower as a cost of credit in the listing of such costs under the "finance charge."

Conclusions

By including the amount of the reaffirmed debt previously discharged in bankruptcy under the "amount financed" rather than under the "finance charge," in cases where discharged debtors apply for and are granted new loans by respondent provided that they reaffirm their discharged debts in whole or in part, Household Finance has failed to disclose accurately the "finance charge" and has thereby violated the Truth in Lending Act and Regulation Z. 15 U.S.C. 1605, 1639; 12 C.F.R. 226.4, 226.6, 226.8. Where the foregoing violation has occurred, it has resulted in other violations of the Truth in Lending Act and Regulation Z, as follows:

(1) Violation for failure to compute and disclose accurately the "annual percentage rate" on the new loan transaction to the nearest one quarter of one percent. 15 U.S.C. 1606, 1639; 12 C.F.R. 226.5(b), 226.6, 226.8. [22]

(2) Violation for failure to compute and disclose accurately the "amount financed" on the new loan transaction. 15 U.S.C. 1639; 12 C.F.R. 226.6, 226.8.

Respondent Household Finance Corporation does business nationwide (see Statement of Stipulated Facts including Attachments A and B) and its practices here involved are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act and are subject to the jurisdiction of the Federal Trade Commission.

Remedy

Respondent Household Finance is a substantial firm engaged in the small loan business. The strong financial interest of Household Finance in obtaining reaffirmation of debts resulting from prior loans which have been discharged in bankruptcy is self-evident. The practice of encouraging reaffirmation of prior discharged loans, as such, is not an issue in this proceeding. But this proceeding is concerned with the right of borrowers to be adequately informed of the true cost of new loans when they do reaffirm debts discharged in bankruptcy as an incident to obtaining such new loans. Over a period of years small loan applicants who have had prior loans to Household Finance discharged in bankruptcy have been required to reaffirm such debts in whole or in part as an incident to obtaining new loans. Over such period, as stated earlier, respondent has violated the Truth in Lending Act and Regulation Z by failing to include the amount of the reaffirmed debt as part of the "finance charge," and by erroneously and improperly including it under "amount financed." Due to this practice borrowers who have reaffirmed their discharged debts to obtain new loans have not been

given the meaningful disclosure of the cost of such new loans that is required by law. Under the circumstances, an order is necessary.

The first sentence of the order issued herein prohibits Household Finance from failing to include in the disclosure of the "finance charge" the amount of any indebtedness by the borrower to Household Finance which was reaffirmed "as an incident to or condition of the extension of credit."

A basic dispute in this proceeding has been whether or not reaffirmation has been incident to or a condition for the granting of new loans to discharged debtors. [23]Household Finance has vigorously argued that reaffirmation has not been required by it as an incident to the grant of a new loan. The undersigned, however, has found the contrary to be the case. An order which simply prohibits failure to include the amount of a reaffirmed debt within the disclosure of the "finance charge" where reaffirmation is an incident to or condition of the extension of credit would be ineffective in this proceeding. The order must establish safeguards so that, where the amount of a reaffirmed debt is not listed as part of the "finance charge" disclosed in connection with a new loan, there will be a reasonable assurance that reaffirmation was not indirectly or implicitly exacted as an incident to or condition of the new loan.

Paragraph 1(a) provides that reaffirmation is not an incident to or condition of the extension of credit *only* if the reaffirmation is not required and is not a factor in the new extension of credit, the amount or the terms thereof. If the reaffirmation of a discharged debt is among the factors given consideration by Household Finance in making its decision to grant a new loan, then it is "incident to" the extension of credit as set out in Section 1605(a) of the Truth in Lending Act and Section 226.4 of Regulation Z.

Where reaffirmation is not specifically tied to a particular new loan but, rather, is allegedly required by Household Finance to restore a debtor to a "creditworthy" standing and, based on such standing, credit is later extended, reaffirmation must still be disclosed as a cost of credit under the "finance charge." Holding otherwise would open the door to evasion of the disclosure requirements of the Truth in Lending Act and Regulation Z in this case. If "fencing in" is necessary in this respect, that is within the authority of the Commission. *Federal Trade Commission* v. *National Lead Company,* 352 U.S. 419 (1957); *Federal Trade Commission* v. *Colgate Palmolive Co.,* 380 U.S. 374 (1957); *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608 (1946).

If full compliance with the letter and intent of the Truth in Lending Act and Regulation Z is to be assured, the following must

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also be provided. Before Household Finance may exclude the amount of a reaffirmed debt from the "finance charge," Household Finance must (1) make a clear and conspicuous written disclosure to the borrower of the amount of the debt to be reaffirmed, the fact that reaffirmation in whole or in part is not required by Household Finance and that reaffirmation is not a factor considered by Household Finance in granting the loan or in its terms or amount and (2) after the foregoing [24]disclosure has been made, Household Finance must receive from the borrower a separate written, signed and dated statement of the agreement to reaffirm.

Where Household Finance has excluded the amount of a reaffirmed debt from the "finance charge" in making a new credit extension, it must allow borrowers a "cooling off" period of 10 calendar days during which the reaffirmation may be rescinded by the borrower after he or she has received notification in writing of the right to rescind. Such an enforcement provision is reasonable, and is necessary to ensure that the requirements of the order herein are not evaded and that, where reaffirmation has occurred and the amount of the reaffirmed debt has not been listed under the "finance charge," reaffirmation has not been a motivating factor in the grant of the new credit. Bankrupt members of the public are likely to have a genuine need for credit and are likely to be in a poor bargaining position vis-a-vis respondent. In such cases, reaffirmation may be exacted tacitly as the price or part of the price of a new loan notwithstanding the provisions of the order. Respondent now provides a "cooling off" period of 10 calendar days to borrowers who have reaffirmed discharged debts (Attachments A and B), so no additional burden is placed upon respondent by incorporation in the instant order of the requirement for a "cooling off" period.

To reiterate, such a "cooling off" period would only apply where the amount of the reaffirmed debt has not been included in the disclosure of the "finance charge." In such cases where a borrower subsequently rescinds his or her reaffirmation, the obligations of the borrower should be no different from what they would have been had there been no reaffirmation and rescission thereof.

The purposes of Paragraphs 2, 3 and 4 of the order are self-evident. Paragraph 5 is a broad provision prohibiting Household Finance from failing to make any of the disclosures required by the Truth in Lending Act and Regulation Z. Once a violation has occurred the public should not have to undertake the high costs of investigation and adjudication to stop other and future violations. *Federal Trade Commission* v. *National Lead Co., supra; Zale Corporation,* 78 F.T.C.

1195 (1971), *aff'd Zale Corp.* v. *Federal Trade Commission,* 473 F.2d 1317 (5th Cir. 1973).

Respondent argues that the Bankruptcy Act of 1978 obviates the need for an order in this proceeding (RRB, pp. 40–42). On November 6, 1978, the foregoing became law. 15 U.S.C. 525. The new Act sharply curtails the legal enforceability of reaffirmed debts previously discharged in bankruptcy. Subsequent to [25]October 1, 1979, neither respondent nor any other consumer loan company will be able to obtain a legally enforceable claim merely by securing a written reaffirmation of a discharged debt as part of a new loan transaction. In order to enforce a reaffirmed discharged debt, specific procedures set out in the new Bankruptcy Act will have to be followed after October 1, 1979, including a hearing before the court which granted the discharge in bankruptcy. 11 U.S.C. 525(c) and (d).

However, these procedures do not render relief herein unnecessary. The new Act states that a case commenced under the prior Act shall be conducted as if the subsequent Act had not been enacted, and that the rights of the parties shall be governed by the prior Act. Complaint counsel point out that there are the following substantial categories of the public where reaffirmation would not be affected by the new Bankruptcy Act (Memorandum in Support, pp. 30–33):

(1) Members of the public who have had debts to Household Finance discharged in bankruptcy and who may seek new loans from Household Finance;

(2) Members of the public who are now presently in bankruptcy proceedings and whose debts to Household Finance will ultimately be discharged, and who may seek new loans from Household Finance;

(3) Members of the public who will file petitions in bankruptcy prior to October 1, 1979 and who will have debts to Household Finance discharged and who may seek new loans from Household Finance.

As to these categories of the public, an order is necessary to ensure that proper disclosure of the "finance charge" and the "amount financed" be made, and that there is a proper calculation and disclosure of the "annual percentage rate."

Furthermore, even after October 1, 1979, an order is necessary to ensure that Household Finance makes the proper disclosures. It may well be that substantial numbers of debtors will reaffirm debts discharged in bankruptcy after the hearing required by 11 U.S.C. 524(d). As to these debtors, disclosures of the "finance charge," "amount financed" and "annual percentage rate" must be properly

made as required by the Truth in Lending Act. The new Bankruptcy Act does not address the matter of disclosures to those obtaining credit. To ensure that the required disclosures are made, an order is required. [26]

ORDER

It is ordered, That respondent Household Finance Corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq.,* as amended), do forthwith cease and desist from:

1. Failing to include and treat as part of the finance charge, as "finance charge" is defined by Sections 226.2(w) and 226.4(a) of Regulation Z, the amount of any indebtedness by the borrower to respondent, previously discharged in bankruptcy, which was reaffirmed as an incident to or a condition of the extension of credit.

In connection with this Order, a reaffirmation is not an incident to or a condition of the extension of credit *only* if:

(a) the reaffirmation is not required by respondent and is not a factor in or connected with respondent's approval of the extension of credit or its terms or the amount of credit extended; and

(b) any borrower who consummates a consumer credit transaction with respondent and who reaffirms a discharged debt to respondent, in whole or in part, executes a separately signed and dated written statement of the agreement to reaffirm after first receiving from respondent a clear and conspicuous written disclosure of (1) the amount of the reaffirmation and (2) that such reaffirmation is not required by respondent and is not a factor in or connected with respondent's approval of the extension of credit or its terms or the amount of credit extended. [27]

2. Failing to compute and disclose accurately the finance charge, as required by Sections 226.4(a) and 226.8(d)(3) of Regulation Z.

3. Failing to compute and disclose the annual percentage rate, as "annual percentage rate" is defined in Sections 226.2(g) and 226.5(b) of Regulation Z, accurately to the nearest quarter of one percent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

4. Failing to compute and disclose accurately the amount financed, as "amount financed" is defined by Sections 226.2(f) and 226.8(d)(1) of Regulation Z, as required by Section 226.8(d)(1) of Regulation Z.

5. Failing in any consumer credit transaction or advertisement, to make all the disclosures that are required by Sections 226.4, 226.5, 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z in the manner, form and amount specified therein.

6. Failing to maintain records of compliance with this Order for three years after the date of this agreement to cease and desist.

It is further ordered, That respondent shall grant to each borrower who consummates a consumer credit transaction with respondent and who reaffirms a discharged debt to respondent, in whole or in part, which is not disclosed as part of the "finance charge" on a new consumer credit transaction, 10 calendar days within which to cancel the reaffirmation by notifying the respondent in writing of the borrower's election to do so.

The foregoing period shall begin to run upon receipt by the borrower of the notices described in the next paragraph of this provision. The borrower's notification of cancellation of his or her reaffirmation, if done by mail, shall be deemed to have been made at the time mailed; if by telegram, mailgram or the like, notification shall be deemed to have been made at the time filed for transmission; and, if the writing is delivered by other means, notification shall be deemed to have been made at the time delivered to the respondent's place of business. [28]

Respondent shall mail to each such borrower the notices set forth in Attachments "1" and "2" to this Order no earlier than two (2) days and no later than fifteen (15) days following consummation of the consumer credit transaction.

If a borrower exercises his or her right to cancel the reaffirmation of a previously discharged debt, then such borrower shall not be obligated to repay the amount of the reaffirmation and any finance charges assessed thereon. Furthermore, the borrower's periodic payments on any debt to respondent remaining after cancellation of the reaffirmation shall be no larger than they were prior to the cancellation.

It is further ordered, That respondent shall forthwith deliver a copy of this Order to cease and desist to all present and future employees who are engaged in the solicitation or extension of consumer credit and shall secure from each such employee a signed

statement acknowledging receipt of this Order and stating the intention to be bound by the requirements hereof.

It is further ordered, That respondent shall notify the Commission within thirty (30) days prior to any change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this Order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this Order and file such other reports as the Commission may require.

ATTACHMENT 1

NOTICE OF RIGHT TO CANCELLATION

Name of _____
(Respondent)

Address of _____
(Respondent)

Name of _____
(Customer)

Address of _____
(Customer)

Dear Customer:

You recently took out a loan with HFC. At that time, you also agreed to repay us an old debt of $ _____ . This old debt had been discharged when you went bankrupt.

You did not have to agree to repay the discharged debt in order to get a loan. We want to be sure you understood that, so we are giving you a chance to cancel *within ten days* your agreement to repay your discharged debt. If you cancel, the $ _____ discharged debt and its finance charges will be dropped. But you will still have to repay the $ _____ you actually got, plus $ _____ in finance charges. Your monthly payments will be no larger than they are now.

You have *TEN DAYS* from the day you get this letter to cancel your agreement to repay your discharged debt. *If you want to cancel,* you must *notify us in writing within ten days.* Use the enclosed notice or send a letter or telegram to the address above.

Sincerely,

ATTACHMENT 2

NOTICE OF CANCELLATION

To _____
(Name of Respondent)

_____
(Address of Respondent)

Please cancel my agreement to repay my old discharged debt of $ _____ .

_____ _____
(Date) (Borrower)

_____

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner:*

I. INTRODUCTION

The complaint in this case charges Household Finance Corporation (HFC) with violations of the Truth in Lending Act (TILA), 15 U.S.C. 1601, *et seq.,* and its implementing Regulation Z, 12 C.F.R. 226. The complaint alleges that HFC, a consumer loan company, has been violating the TILA and Regulation Z by not including the amount of reaffirmed debts in the "finance charge" of later loans. The complaint avers that a debt discharged in bankruptcy must be reaffirmed by the debtor in order to obtain new credit from HFC, and thus is a cost of credit which under the TILA and Regulation Z must be disclosed in the "finance charge." Complaint counsel seek an order which, *inter alia,* would require HFC to include the amount of the reaffirmed debt in the finance charge and to compute and disclose accurately the finance charge, annual percentage rate, and "amount financed" (amount of credit extended to the customer).

Following issuance of the complaint on July 10, 1978, complaint counsel and respondent HFC agreed in lieu of trial to a "Statement of Stipulated Facts" to serve as the sole factual record for this proceeding. On March 16, 1979, Administrative Law Judge Hanscom found HFC to be in violation of the TILA and Regulation Z as alleged in the complaint. The ALJ's order would require HFC to disclose, as part of the finance charge, the amount of discharged debt reaffirmed in connection with subsequent grants of credit to the debtor. It also defines when reaffirmation would not be a condition [2]of credit and thus would not have to be disclosed in the finance charge; provides

for a 10-day cooling-off period following consummation of the subsequent loan transaction where the amount of the reaffirmed debt has been excluded from the finance charge; and requires compliance with all disclosure provisions of Regulation Z.

On April 5, 1979, HFC served notice of its intention to appeal the ALJ's decision. On appeal complaint counsel argue in support of the conclusions and order issued below and do not cross-appeal on any issues.

For the reasons discussed below, the Initial Decision and Order are reversed and the complaint in this matter is dismissed.

II. STATEMENT OF THE FACTS

The ALJ's Findings of Fact repeat virtually verbatim the parties' "Statement of Stipulated Facts." They establish the following.

For the past several years, many borrowers of HFC have filed petitions for bankruptcy, been adjudged bankrupt, and obtained discharges of their indebtedness to HFC. I.D.F. 4-5.[1] In many instances HFC then has notified discharged debtors that upon reaffirmation of a part or all of their discharged debts, and if they are otherwise eligible for credit, it would reestablish their credit with HFC and shortly thereafter grant them new loans. I.D.F. 6. Many discharged debtors then have sought new loans from HFC. I.D.F. 7. [3]

During negotiations for new loans, discharged debtors and HFC discussed the question of reaffirmation of part or all of the consumer's debt to HFC. I.D.F. 9. Pursuant to HFC policy and practice, consumers in these negotiations were informed by HFC employees that reaffirmation was necessary to reestablish their

[1] The following abbreviations of citations are used herein:

I.D.F.	–	Initial Decision Finding of Fact No.
I.D.	–	Initial Decision Page No.
CB	–	Complaint Counsel's Memorandum of Law in Support of Proposed Findings of Fact, Conclusions of Law, and Order
RB	–	Respondent's Memorandum of Law in Support of Proposed Findings of Fact, Conclusions of Law, and Order
CR	–	Complaint Counsel's Reply Memorandum of Law and Objections to Respondent's Proposed Findings of Fact
RR	–	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
CAB	–	Complaint Counsel's Appeal Brief Page No.
RAB	–	Respondent's Appeal Brief Page No.
RRAB	–	Respondent's Reply Appeal Brief Page No.

credit with HFC and that part of any new loan from HFC had to be used to repay part or all of their previously discharged debt to HFC. I.D.F. 12. On or around June 29, 1977, employees of HFC were instructed by a Home Office Memorandum that in any discussion of reaffirmation or a new loan, the bankrupt must be advised that there is no legal obligation to repay the discharged debt, but that part of any new loan must be used to settle the discharged debt. Attachment A (p. 1) to I.D.F.

From July 1, 1977 to the present, bankrupt consumers of HFC have received a "Statement of Rights, Agreement and Cancellation Notice" from HFC. I.D.F. 17. This Statement (Attachment B) apprises them, among other things, that they have no legal obligation to repay any part of their discharged debt to HFC but that to obtain a new loan they will be required to agree to repay all or part of their outstanding debt to HFC. The Statement also informs them that they may cancel within 10 days their agreement with HFC to use part of the new loan to repay the old but that if they do cancel, they are still required to pay off the new loan.

Discharged debtors of HFC thus know that they must reaffirm part or all of their debts to HFC before obtaining new loans. Many of them have reaffirmed and obtained new loans for one or more of the following reasons: (a) to retain collateral from the prior debt owed HFC; (b) to secure the release of a co-maker's obligation to repay the prior debt; (c) to settle bankruptcy court litigation over the prior debt; and (d) to reestablish credit with HFC. I.D.F. 10.[2]

Respondent HFC imposes a finance charge on the new loans made to reaffirming debtors. I.D.F. 13. This charge applies both to the part of the loan granted to repay the prior debt and to the part which represents new money paid to the consumer. I.D.F. 13. For these loans, HFC's truth-in-lending disclosure policy has been that the amount of the [4]reaffirmed debt to be paid from part of the new loan is disclosed in the amount financed rather than the finance charge. I.D.F. 14. It is acknowledged that if the amount of the reaffirmed debt were made part of the finance charge, the annual percentage rate for the loan would be increased. I.D.F. 15.

In addition to HFC, many of its competitors require reaffirmation before reextending credit to discharged debtors and disclose the amount of the reaffirmed debt in the amount financed rather than

[2] It should be noted that after the complaint in this case was issued, severe restrictions were placed on contractual reaffirmation of discharged debts by the Bankruptcy Reform Act of 1978, Pub. Law 95-598, 11 U.S.C. 525(c) and (d). Under this law, reaffirmation agreements are unenforceable absent approval, following a judicial hearing, by the court which granted the discharge in bankruptcy. *But see Marathon Pipeline Co. v. Northern Pipeline Construction Co.*, 49 U.S.L.W. 1173 (April 23, 1981) (jurisdictional provision of Act delegating new authority to bankruptcy court judges declared unconstitutional; order dismissing case stayed pending appeal).

the finance charge of the new loan. I.D.F. 24. Until this proceeding was initiated, neither the Commission nor the Federal Reserve Board had challenged this practice in any formal proceeding. I.D.F. 25.

III. DISCUSSION

The legal issue presented is whether a creditor must disclose in the finance charge the amount of debt reaffirmed with respect to a loan transaction in which a portion of the loan proceeds is used to pay off the reaffirmed debt. The Administrative Law Judge answered this question in the affirmative. I.D. at 21. HFC's appeal challenges the Initial Decision on the following grounds:

One, the Commission lacks jurisdiction in this case because the record fails to show that the challenged practices were in or affected interstate commerce. RAB at 7.

Two, the transactions in issue are "refinancings" under Regulation Z, in which the amount of a reaffirmed debt is disclosed in the "amount financed." RAB at 20–25.

Three, assuming the transactions in issue are found to be new loans rather than refinancings, mandatory reaffirmation is not a condition for receiving a specific loan from HFC, and thus is not a cost of credit within the definition of finance charge in the TILA and Regulation Z. RAB at 6.

Four, the order entered below is not in the public interest because it will create a result contrary to the purposes of the Truth-in-Lending Act. Id.

Five, the order entered by the ALJ exceeds the Commission's statutory authority and is overbroad. RAB at 7.

A. *Jurisdiction*

The Commission's jurisdiction in this matter rests on Section 108(c) of the TILA, 15 U.S.C. 1607, which states that violations of that Act shall also be violations of the requirements of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.* Section 108(c) specifically provides in part that: [5]

> . . . All of the functions and powers of the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title *irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.* (emphasis added)

By its terms, Section 108(c) does not require a showing that the

challenged practices are in or affect interstate commerce. Nevertheless, respondent HFC alleges that a relationship to interstate commerce is the test of jurisdiction here, and that the record does not permit such a finding. RAB at 24–37.[3] Respondent's jurisdictional argument is without merit. The Commission explicitly has jurisdiction in this case.

B. *The Nature of the Transaction*

The answer to the TILA disclosure question presented depends on whether the transaction in issue is a new loan subject to the finance charge disclosure requirements of Section 226.4(a) of Regulation Z, 12 C.F.R. 226.4(a),[4] or a refinancing within the meaning of Section 226.8(j) of Regulation Z, 12 C.F.R. 226.8(j).[5] The Commission [6] believes it is a refinancing in which the amount of the reaffirmed debt should be disclosed in the "amount financed."[6]

HFC's loans to bankrupt customers involve reaffirmation of an existing but discharged obligation coupled with the advancement of new money.[7] Although these "hybrid" transactions appear at first blush to be new loans, as the Commission had reason to believe when it issued the complaint and as the ALJ found, I.D. at 20, closer scrutiny, aided by the record and the arguments of the parties, reveals that they are more in the nature of refinancings.[8]

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[3] Respondent may be laboring under the false impression that this is a case brought under Section 5 of the FTC Act, which has an "in or affecting commerce" provision. Respondent may have formed this impression from the ALJ's conclusion that the alleged practices meet the "commerce" test of jurisdiction in the FTC Act. I.D. at 22. Since jurisdiction rests on Section 108(c) of the TILA, which explicitly overrides the jurisdictional requirements of the FTC Act, the ALJ need not have made this finding and the Commission need not examine the factual basis for it.

[4] Section 106(a) of the TILA, as amended, 15 U.S.C. 1605(a), and Section 226.4(a) of Regulation Z combine to define "finance charge" as the "sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit."

[5] Section 226.8(j) provides: "*Refinancing, consolidating, or increasing.* If any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, such transaction shall be considered a new transaction subject to the disclosure requirements of this Part. For the purpose of such disclosure, any unearned portion of the finance charge which is not credited to the existing obligation shall be added to the new finance charge and shall not be included in the new amount financed."

[6] In a refinancing of this type, the prior debt is included in the "amount financed" while the unearned interest from, but not credited to, the prior obligation is added to the new finance charge. *See* Section 226.8(j) of Regulation Z.

[7] Although a debt discharged in bankruptcy is unenforceable by an action *in personam* against the debtor, Section 14 of the Bankruptcy Act, as amended, 11 U.S.C. 32, it is a continuing obligation collectable by other legal means, such as a counterclaim, *Binnick* v. *Avco Financial Services of Nebraska,* 435 F. Supp. 359 (D. Neb. 1977), or retention of security, *In re Traham,* 283 F. Supp. 620, *aff'd,* 402 F. 2d 797, *cert. denied,* 394 U.S. 930 (1969). Legally, the debt survives the discharge and is neither forgiven nor cancelled. *Kessler* v. *Dept. of Public Safety,* 369 U.S. 153, 170 (1961), citing *Zavela* v. *Reeves,* 227 U.S. 625 (1913); W. Collier, 1A *Collier on Bankruptcy* Section 17.33 (14th Ed. J. Moore and L. King ed. 1971). Reaffirmation thus does not create a new debt; it simply reactivates an existing one. The ALJ's contrary assertion that a discharged debt is not an "existing extension of credit," within the meaning of Section 226.8(j) of Regulation Z, disregards the continuing nature and legal enforceability, in certain circumstances, of the obligation. See I.D. at 19.

[8] It is noteworthy, although hardly dispositive, that HFC's instructions to employees on these transactions are contained in a memo entitled "Bankruptcy Refinancing Agreements." See Attachment A.

The fundamental nature and purpose of these transactions is the satisfaction of an existing obligation. Reaffirmation is the central element of a process whereby funds become available to the bankrupt consumer to pay back an existing loan. [7]It is directly related to the satisfaction of a continuing obligation and only indirectly related to "new" extensions of credit. If anything, the simultaneous advance of additional money creating a new obligation is an "incident to" the core transaction enabling repayment of the reaffirmed loan, and does not alter its fundamental character as a refinancing. The loan does not create a new obligation in the first instance; it merely resolves an existing one by being applied, at least in part, toward repayment of the reaffirmed debt.

HFC's purpose in providing these initial loans to bankrupt consumers also supports the conclusion that they are refinancings dedicated to satisfying existing obligations. The extension of credit in connection with an existing debt is designed principally to return HFC and the borrower to the *status quo* that existed before the debt was discharged in bankruptcy. The grant of money in connection with the reaffirmation enables, in fact requires, the borrower to use at least part of the loan to pay off the debt owed before bankruptcy, to the benefit of HFC. Thus, it is reasonable to assume that HFC's immediate interest in resuming a credit relationship with a discharged debtor, subject to a requirement to reaffirm, is to recover the proceeds of the existing loan plus interest accrued on it;[9] otherwise, HFC would have little reason to require reaffirmation by discharged debtors seeking further extensions of credit.

From the borrower's standpoint, reaffirmation represents more than a price for an individual loan. It enables the consumer to reestablish credit with HFC, retain or recover collateral on the prior loan, secure the release of a co-maker's obligation to repay the earlier debt, and settle bankruptcy litigation. I.D.F. 10. Indeed, most bankrupt customers of HFC had one or more of these purposes in mind when they reaffirmed their debts. Id. Thus, while HFC's reaffirmation agreements are related to specific extensions of credit, their broader function is to ensure repayment of the earlier loan and enable HFC and the bankrupt consumer to pursue their respective interests in resolving the earlier transaction. This aspect of reaffirmation in connection with an advance of money distinguishes it from other charges, such as interest or loan fees, which are imposed and paid solely for the purpose of financing new loans. [8]

The views of the Federal Reserve Board are of course highly

[9] This assumption is reinforced by the fact that HFC had the contractual right to enforce reaffirmation agreements whether or not the related loan transaction was consummated. See Attachment A, RAB at 18–20.

relevant to the Commission's determination about the nature of the credit transactions involved in this case.[10] While no official opinion of the Board itself has directly addressed the issue in this case, the Board's staff has said formally that reaffirmations are refinancings under Section 226.8(j) of Regulation Z.[11] In FRB staff Opinion Letter No. 415, CCG ¶ 30,604 (October 29, 1970), reaffirmed in staff Opinion Letter No. 426, CCG ¶ 30,613 (November 24, 1970), the Board staff said:

> It is our view that Section 226.8(j) which requires new disclosures whenever any existing extension of credit is refinanced would apply to any reaffirmation *except* those which involve no change in the credit terms . . . if any additional amounts were advanced . . . or any other material terms of the original obligation modified, we would view it as a 'refinancing' under Section 226.8(j) requiring new disclosures. (emphasis in original)

Five years later, the FRB staff published Opinion Letter No. 966 which is relied upon by complaint counsel because it suggests, by negative implication, that where reaffirmation of an existing debt is a condition of a specific extension of credit, it should be disclosed in the [9]finance charge.[12] This opinion expressly did not deal with such a situation, however, and the Board staff has had occasion in a specific case to look closely at the true character of a transaction like the one involved in this proceeding. Further, Letter No. 966 did not repudiate or otherwise limit the staff's previously stated position that any reaffirmation involving a change in credit terms, including one in which new money is advanced, is a refinancing.

Asserting serious ambiguity in the FRB staff's position, complaint counsel filed a motion on December 3, 1979, following oral argument, urging the Commission to ask the Board to file a statement of its views in this case.[13] The Commission does not believe the Board

[10] An important consideration in TILA matters before the Commission is the formal position of the Federal Reserve Board, which is recognized as the primary issuer of regulations and interpreter of the law in this area. Section 105 of the TILA, 15 U.S.C. 1604; *Ford Motor Credit v. Milhollin*, 100 S.Ct. 790, 794, citing *Mourning v. Family Publications Service Inc.*, 411 U.S. 356, 93 S.Ct. 1652 (1973). Indeed, good faith reliance upon a Board interpretation now constitutes a defense to any enforcement action brought by the Commission. Section 23(b) of the Federal Trade Commission Act, as amended by the FTC Improvements Act of 1980, 15 U.S.C. 57b–4.

[11] The official interpretations of the Board's staff are a reliable indicator of Board policy and are accorded substantial deference by the credit industry, Section 130(f) of TILA, 15 U.S.C. 1640(f), FRB Letter No. 444, CCG ¶ 30, 640 (March 1, 1971), the courts, see, e.g., *Ford Motor Credit v. Milhollin, supra*, at 797, and by the Commission.

[12] FRB staff Opinion Letter No. 966, CCG ¶ 31,305 (December 4, 1975). This letter states, in pertinent part:

> Staff believes that the amount of the reaffirmed debt should not be included in the finance charge or reflected in the annual percentage rate on any future extensions of credit to the debtor. Although the reaffirmation is a prerequisite to the bank's consideration of future credit applications by the debtor, the reaffirmation is not related to any particular credit extension; it is simply one element in the bank's decision to make its credit services in general available to the debtor. Since the reaffirmation is not a condition of a specific credit extension, the amount of the reaffirmed debt would not, in staff's view, come within the definition of a finance charge under Section 226.4(a) of the Regulation.

[13] Prior to this motion, complaint counsel also had filed a motion, dated November 21, 1979, requesting that the Commission disregard an October 18, 1979 FRB staff letter (Attachment A to the motion) on reaffirmations presented by respondent for the first time at the oral argument. Complaint counsel argue in their motion that this

(Continued)

staff's expressed views, taken together, leave significant room for dispute. Although Letter 966 may have created some ambiguity in the treatment of reaffirmations, there has been no significant modification of the Board staff's earlier opinion that reaffirmations coupled with advancements of new money are refinancings. The Commission's decision today is consistent with that position. [10]

In addition, since issuance of the complaint in this proceeding, Congress has amended the Truth-in-Lending Act[14] and the Board has revised Regulation Z.[15] The new regulation, which became effective on April 1, 1981 but does not become enforceable until March 31, 1982, significantly redefines a "refinancing."[16] In explaining the revised definition, the Board said that it "most closely resembles the events intended to be covered by refinancing disclosures." 46 *Fed. Reg.* at 20882. By its terms, the new definition seems to encompass HFC's loans to bankrupt consumers, which involve repayment of an existing obligation and assumption of a new one (through the advancement of additional money) by the same person. Furthermore, the exemption from *refinancing* disclosures for agreements, *including reaffirmations,* that arise from a judicial proceeding,[17] indicates that the Board agrees with its staff that loans involving reaffirmation are refinancings. These loans are subject to the redisclosure requirements of Section 226.20, as revised, and not to the finance charge provisions of Section 226.4(a) of the regulation (unchanged from the old).

The Commission thus does not believe the Board's position needs to be clarified. Accordingly, complaint counsels' motion for clarification is denied. [11]

C. *The Relationship of the Proposed Order to the Purposes of the TILA.*

The Commission holds today that the cost of reaffirmation should be included in the amount financed rather than the finance charge. This conclusion is corroborated not only by the position of the

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letter had not been placed on the public record of this matter, was not an official interpretation of the FRB staff, and had not been made public by the Board. Complaint counsel thus contend that they had no reasonable opportunity to know about the letter or prepare a rebuttal to it. Because consideration of this letter is unessential to a proper decision of this case, complaint counsels' motion to disregard it is granted.

[14] Truth-in-Lending Simplification and Reform Act (Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132).

[15] Truth-in-Lending; Revised Regulation Z, 46 *Fed. Reg.* 20848 (April 7, 1981).

[16] Section 226.20(a) of Regulation Z, as revised, states that a refinancing occurs "when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer . . . . The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation."

[17] See Section 226.20(a)(3) and 46 *Fed. Reg.* 20882 where the Board, amplifying upon Paragraph (a)(3), indicates that exempt agreements include reaffirmations of debts discharged in bankruptcy.

Federal Reserve Board, but by respondent's showing of the adverse effects that the proposed finance charge disclosure could have on credit comparisons.

Respondent argues that the proposed disclosure requirement would distort comparison-shopping for credit by bankrupt customers and foster the false impression that a competitor disclosing an amount equal to the prior debt in the amount financed was offering a better deal than HFC.[18] Respondent purports to show that if the amount of the reaffirmed debt has to be disclosed in the finance charge by HFC, the "annual percentage rate" could be substantially distorted, thereby misleading consumers into making erroneous comparisons and economically irrational credit purchasing decisions. This result would [12]contravene Congress' stated intention in Section 102(a) of the TILA, 15 U.S.C. 1602, to promote well-informed comparison-shopping for credit.[19]

Neither the ALJ nor complaint counsel have refuted respondent's illustration of the proposed disclosure's potential for hindering credit comparisons; in fact, both concede there would be distortion. However, the ALJ rejects respondent's showing as:

only hypothetical, and may have little or no relation to reality. The fact that respondent can construct hypothetical cases where inclusion of a reaffirmed debt in the 'finance charge' results in a distortion of the "annual percentage rate" when compared with an equivalent amount of a new loan by a competitor involving no reaffirmation, does not mean that the true cost of credit need not be disclosed by Household Finance as required by the Truth in Lending Act and Regulation Z. I.D. at 21. [13]

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[18] In respondent's hypothetical example, the "annual percentage rate" of a $1,100 loan by HFC to a reaffirming consumer would be 120% if the reaffirmed debt were treated as a finance charge, and the total obligation would be $1,320. The "annual percentage rate" for a competing loan of $1,100, which would not involve reaffirmation but would be used in part to pay the debt to HFC, would be 25%, with a total obligation of $1,375. The $55 difference results because the second lender's interest rate is 25% while HFC's is 20%. Respondent's point is that because of the "sky-high" "annual percentage rate" computed for the HFC loan using the proposed method of disclosure, the consumer may think that the other loan is the better deal, when in fact it is not. For the full example, see RAB at 32-33.

[19] Section 102 of the TILA declares that the Act is designed to assure a meaningful disclosure of credit terms so that the consumer will be able *to compare more readily* the various credit terms available to him . . . (emphasis added).

While the proposed disclosure could violate this tenet of the Act by *disabling* bankrupt customers of HFC from making well-guided comparisons of credit, complaint counsel argue that Congress intended for all imposed costs of credit to be included in the finance charge unless specifically excluded by the TILA or Regulation Z. CR at 13-16. It asserts that since reaffirmation is not specifically excluded it is, by definition, a finance charge. The legislative history and case law cited by complaint counsel, however, do not establish that Congress intended such a mechanistic application of the finance charge provisions of the Act in the face of evidence that it could hinder informed comparison-shopping for credit. The basis for the holding in *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1247 (D. Ga. 1971) that only those charges explicitly exempted from inclusion in the finance charge may be excluded from it, was the intent of Congress "to establish by statute and regulation a uniform method for such determination [of finance charge] so that consumers could 'comparison shop' by looking at a single 'price tag'—the 'annual percentage rate'." In that case, the finance charge (a $1.00 notary fee) was unlikely to significantly affect total loan costs and credit comparisons. The district court was not confronting, as is the Commission here, a charge that could distort the "price tag" of the loan—the "annual percentage rate"—and induce a skewing of comparisons by consumers and economically unsound credit decisions.

The Commission agrees with respondent that this example is hypothetical only because the proposed disclosure has not yet gone into effect. RAB at 33. Moreover, the ALJ has given the Commission no reason to believe that the example will not occur in practice. In addition, respondent's position in opposition to the proposed disclosure is not inconsistent with the objectives of meaningful disclosure and credit comparisons established by the TILA and Regulation Z. If the cost of reaffirmation is included in the "amount financed," consistent with our determination that HFC's loans to bankrupt consumers are refinancings, the "annual percentage rate" for those loans will bear a much closer "relation to reality" than would the result dictated by the Initial Decision.

Complaint counsel attempt to mitigate the alleged impact of the proposed order on two grounds. First, they argue that respondent's example is not supported by any facts of record. In respondent's example, the consumer reaffirms his discharged debt to HFC in order to retain property in which HFC has a security interest. The record indicates that retention of property is one of the reasons consumers have reaffirmed their debts to HFC, I.D.F. 10, but complaint counsel point out that it does not show what portion of consumers have reaffirmed for this reason. Complaint counsel therefore argue that it is impossible to conclude from the record that respondent's example is representative of the impact the proposed order would have on actual consumer credit transactions. CR at 19.

This argument misses the mark. The proposed disclosure potentially could have the described impact whenever a bankrupt customer, *for whatever reason,* wants to pay off a discharged debt to HFC, considers HFC's terms for a loan (including the requirement to reaffirm) and then compares competing credit terms. Further, the record indicates that in many cases discharged debtors have sought loans from HFC, I.D.F. 7, subject to reaffirmation. I.D.F. 9-10. Although the number of discharged debtors who have sought loans from HFC is unknown, those who shop around for credit would be potentially exposed to the consequences of the proposed disclosure seen in respondent's example. Thus the Commission cannot agree with complaint counsel that the record provides no support for respondent's illustration, and a finding, that the proposed disclosure could adversely affect the ability of bankrupt customers of HFC to comparison-shop for credit.

Second, complaint counsel contend that similar distortions can

result from other finance charge disclosures, such as credit life insurance, which are required by the TILA or [14]Regulation Z.[20] Complaint counsel admit, however, that the difference in annual percentage rates shown in its example is of a lesser magnitude than that alleged here. CR at 20. Further, given the clear policy in opposition to lending disclosures that impede comparison-shopping for credit and thereby frustrate the purpose of the TILA, the Commission does not accept the proposition that "distortion" of credit comparisons in one context is necessarily precedent for mandating distortion in another.

Finally, an important consideration in today's decision is that the Commission fails to see how HFC's current practice of disclosing the reaffirmation in the amount financed itself misleads and harms consumers. Presumably consumers are aware from their bankruptcy proceedings of their discharged debts to HFC. They are told by HFC that reaffirmation is a precondition for receiving further credit from the company. Attachment B to I.D. Thus, consumers know they must reaffirm; they negotiate the amount that they reaffirm; and they know that a like percentage of any subsequent loan will be used to repay the amount reaffirmed. The Commission does not believe, therefore, that disclosure of the amount of reaffirmation in the finance charge would better in any significant way the bankrupt customer's understanding of the terms and requirements of the transaction.

As this opinion has stated, the Commission views HFC's loans to bankrupt consumers as refinancings under Regulation Z, and is dismissing the complaint on that ground. The reasons for this result, discussed *supra,* coupled with the apparent absence of consumer harm from the challenged practice and the possibility of adverse effects from the disclosure proposed by the ALJ, persuade the Commission that the amount of a reaffirmed debt should be included in the amount financed of the transactions in issue.

Because we are dismissing the complaint, the Commission does not reach or decide the specific remedial issues, such as the alleged overbreadth of the proposed order, presented by HFC's appeal.

Final Order

This matter has been heard by the Commission upon the appeal of respondent from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the

[20] In an example of their own, complaint counsel show how the annual percentage rate would differ between a consumer loan in which the purchase of credit life insurance is required and one in which it is not. See CR at 20-21.

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reasons stated in the accompanying Opinion, the Commission has determined to sustain respondent's appeal. Complaint Counsels' motions to disregard a letter presented by respondent at oral argument and to request a statement of views from the Federal Reserve Board are granted and denied, respectively. Accordingly,

It is ordered, That the complaint is dismissed.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 9130. Interlocutory Order, Aug. 6, 1981

ORDER

The Administrative Law Judge, pursuant to Section 3.23(b) of the Rules of Practice, has certified to the Commission complaint counsel's application for review of the ALJ's prehearing order of March 2, 1981, directing them to "exclude resort" to special reports under Section 6(b) of the FTC Act. The ALJ, in authorizing the appeal, stated that his ruling "involves in part Section 6 issues which lie without the Part 3 Rules of the Commission."

I. BACKGROUND

The adjudication in this case began on August 10, 1979, when the Commission issued a complaint charging that the proposed acquisition by respondent Exxon Corporation ("Exxon" or "respondent") of Reliance Electric Company would violate Section 7 of the Clayton Act, as well as Section 5 of the FTC Act. The Commission entered an order on that date directing that the case be tried on an expedited basis. On October 26, 1979, the United States District Court for the District of Columbia entered a hold-separate order pending the administrative proceeding. The first prehearing conference was held before the ALJ on October 24, 1979, and several conferences were subsequently held to map out a proper route for discovery.

During a prehearing conference on February 27, 1981, the ALJ requested counsel to describe the progress of their respective discovery efforts. This review led to a discussion of complaint counsel's plan to use Section 6(b) as a means of discovery. The ALJ then stated his intent to disallow the use of Section 6(b) and on March 2, 1981, he issued a pretrial order directing complaint counsel "to proceed forthwith by way of Part 3 discovery rules and exclude the Section 6 method."

In his March 18, 1981, order authorizing complaint counsel to file an application for review pursuant to Rule 3.23(b), the ALJ justified his decision to preclude the use of Section 6(b) as a means of discovery on two grounds: (1) the injection of Section 6 issues into the proceeding might result in needless and undue delay, in contravention of the Commission's order dated August 10, 1979; and (2) complaint counsel's use of Section 6(b), "a device not available to respondents, would be fundamentally unfair."

Complaint counsel, on appeal, assert, among other things, that pretrial discovery under Section 6(b) is lawful and that it is the only satisfactory and workable method of discovery for this particular case. In this connection, they claim that their proposed Section 6(b) questionnaire is designed to gather information related to (1) the identification of economically significant markets and submarkets; (2) the determination of universe and individual firm market share data within those markets and submarkets; and (3) the identification and description of barriers to entry into those markets and submarkets or to "significant" competition by "minor" firms already in those markets or submarkets. They also assert that *subpoenas duces tecum* would be an inadequate substitute for 6(b)'s because, *inter alia,* the returns would include highly technical engineering documents, the interpretation of which would be "time-consuming, in some instances impossible, and, because it would require technical consultants, extremely expensive given projected budget constraints"; their draft questionnaire "covers the breadth of a company's involvement in the relevant market [and] *** [c]omplaint counsel would be required to spend untold hours studying the company and the interrelationships between its sets of records in order to determine the answers to the survey questions"; and responsive documents may not be available.

Complaint counsel also assert that the ALJ had no authority to deny the use of Section 6(b) reports because "only the Commission has the power to issue orders for special reports under Section 6(b) of the FTC Act; the Commission has not delegated that authority to the Administrative Law Judges." Finally, they argue that the judge "clearly abused" his discretion by providing, at the prehearing conference, inadequate reasons for his decision, and that he failed to afford them an adequate opportunity to be heard on the validity of their request.

Like the ALJ, respondent contends that unfairness would result if complaint counsel were allowed to use a method of discovery unavailable to respondent. Moreover, respondent maintains that the use of Section 6(b) reports would (1) impose an undue burden on third parties because they would be subjected to overlapping and multiple demands and (2) result in delays in the proceedings because of likely resistance by third parties. Finally, respondent argues that the use of Section 6(b) would be improper because it is not provided as a discovery device in Part 3 of the Commission's Rules of Practice.

II. COMPLAINT COUNSEL'S APPLICATION FOR REVIEW

Interlocutory appeals are generally disfavored because they may interfere with the orderly and expeditious conduct of the adjudicative process. In particular, applications for interlocutory review of discovery rulings will rarely be granted because such review could undermine the responsibility that our administrative law judges have to manage carefully the discovery process. *Bristol-Myers Co.*, 90 F.T.C. 273 (1977). We reaffirmed this principle recently in adopting revisions to our discovery rules. 43 FR 56862 (1978). Today we again reaffirm the crucial responsibility of the law judges to keep a firm hand and careful eye on the discovery process toward fair and expeditious conduct of the adjudicatory process.

Complaint counsel's application, however, raises issues that go beyond the proper exercise of an ALJ's discretion in ruling upon discovery requests; it also presents the questions of whether Section 6(b) should be available as a discovery device in adjudicatory proceedings and, if so, how the exercise of Section 6(b) authority should be used. Because of the importance of this issue not only for this matter, but for discovery requests in future cases, we grant complaint counsel's application for review and confine our review to these two questions.

III. THE USE OF SECTION 6(B) IN ADJUDICATIVE PROCEEDINGS

Over the past 25 years, the Commission has issued Section 6(b) special reports in several adjudicatory proceedings, *e.g., Campbell Taggart Associated Bakeries, Inc.*, 71 F.T.C. 509, 521-22 (1967); *Scott Paper Co.*, 63 F.T.C. 2240, 2243 (1963); *Crown Zellerbach Corp.*, 51 F.T.C. 1105 (1955); see *In re Subpoena Duces Tecum Addressed to Atlantic Richfield Co.*, File No. 741-0019, at 36 n.45 ("ARCO Statement"), and has allowed the parties to use evidence compiled through the use of Section 6(b) orders issued prior to the initiation of adjudicatory proceedings, *e.g., Jim Walter Corp.*, 90 F.T.C. 671, 700 (1977), *vacated and remanded on other grounds*, 625 F.2d 676 (5th Cir. 1980); *Dean Foods Co.*, 70 F.T.C. 1146, 1267 n.73 (1966). Although these opinions did not discuss the general question of the propriety of issuing Section 6(b) orders during the course of an adjudication, decisions by the Commission to issue pretrial Section 6(b) orders necessarily reflected a judgment that Section 6(b) can be an appropriate tool of discovery. We are not persuaded that their use should be abandoned where a party can make a real showing of need.

Respondent has not challenged the Commission's statutory authority to issue special report orders for the purpose of pretrial

discovery and we are satisfied that Sections 6(a), 6(b), and 6(g) of the FTC Act authorize their use. The Supreme Court, in rejecting a claim that Section 6(b) could not be used in aid of a Section 5 proceeding (in that case, a compliance proceeding), stated that it found "nothing that would deny its use for any purpose within the duties of the Commission, including a Section 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 649–50 (1950).

Respondent does argue, however, that the Commission's own Rules of Practice preclude the issuance of Section 6(b) orders during the course of an adjudicative proceeding.

Section 6(b) orders to file special reports are not expressly included among the discovery devices described in the Commission's rules governing adjudicatory matters. Nevertheless, the Commission has stated that "[t]he discovery rules do not provide the exclusive means by which parties may obtain information, and are not intended to limit such ability as a party otherwise may have to obtain information through voluntary means or that may otherwise be available" to it. 43 FR 56862 (1978). In an earlier statement concerning an investigatory subpoena, the Commission indicated that its existing discovery rules do not limit complaint counsel's access to information properly obtained by the Commission for other purposes and, citing adjudicative cases in which Section 6(b) orders had issued, stated that "the Part 3 discovery rules do not provide the exclusive means by which the Commission's powers of compulsory process may be invoked in aid of a pending adjudicative proceeding." ARCO Statement at 36.

Likewise, two decisions, which preceded the promulgation of the new discovery rules, have held that the administrative law judges are empowered by Rule 3.42(c) to employ discovery procedures which are not specifically authorized by the Rules of Practice. In *Exxon Corp.*, 90 F.T.C. 450, 452 (1977), the Commission held that ALJ's are authorized to impose "production procedures designed to assure orderly compliance with subpoenas," even though such procedures were not mentioned in the Rules of Practice. See also *Century 21 Commodore Plaza, Inc.*, 89 F.T.C. 108 (1977) (authorizing issuance of access order). The Commission in *Exxon,* however, stated that

> [d]iscovery should ordinarily be by the methods described in the Rules of Practice. Only where necessary to the conduct of "fair and impartial hearings * * * [and] to avoid delay in the disposition of proceedings," Rule 3.42(c), may the law judges resort

to discovery methods not explicitly sanctioned by the Rules. Moreover, the Administrative Law Judges may not depart from the specific requirements of applicable rules and any orders they issue must, of course, be authorized by the F.T.C. Act. [90 F.T.C. at 453.]

We therefore see no reason why the rules should be construed to preclude the issuance of Section 6(b) orders in adjudications and to require that adjudications be conducted "as if the information did not exist * * * ." *Morton Salt, supra,* 338 U.S. at 649-50.[1] Nonetheless, we believe the Commission, in adopting the current discovery rules, contemplated that the devices specifically authorized would be adequate to meet the needs of the typical case and we see no reason to depart from our holding in *Exxon* that "[d]iscovery should ordinarily be by the methods described in the Rules of Practice" and that other discovery procedures should be used "[o]nly where necessary to the conduct of 'fair and impartial hearings * * * and to avoid delay * * * .'"[2]

Respondent also asserts that resort to the Commission's Section 6(b) authority during an adjudication would "strip" the ALJ's of their authority to control discovery, and thus run counter to the Commission's conclusion that the "complexity of many Commission proceedings and the potential for delay inherent in discovery require careful supervision by the Administrative Law Judge at every stage of the proceedings." 43 FR 56863 (1978).

Although we are not prepared to construe Section 3.42(c) of the Rules of Practice, see p. 5, *supra,* to authorize the administrative law judges to issue Section 6(b) orders, we do not intend to permit ourselves to interfere with the ALJ's ability to maintain proper control of the pretrial proceedings. Thus, when a party files a petition for issuance of a special report order, we would hope that the ALJ's will accompany their certifications of these motions to the

[1] Respondent argues that Rule 2.12(a) provides that the Commission's Section 6 report powers may be used only for purposes of conducting investigations, not adjudications. That rule states in part:

> In investigations other than those covered by Section 20 * * * the Commission may issue an order * * * to file a report or answers in writing to specific questions * * * .

We do not understand this language, in Part 2 of the Rules, to do anything more than describe the Commission's powers to issue Section 6(b) orders in its nonadjudicative proceedings. An inference cannot permissibly be drawn that a Part 2 rule would purport to describe all the purposes for which a statutory procedure might be used to collect information.

[2] "Necessary" should not be understood to suggest some standard of absolute need, that without a special report order, a party could not possibly prove its case or rebut evidence offered by its opponent. A discovery procedure may fairly be said to be "necessary to the conduct of fair and impartial hearings and to avoid delay in the disposition of proceedings" if, taking account of such relevant considerations as costs (both to the subject of the proposed discovery and to the discovering party), the speed with which discovery might be completed, and the likelihood that the proposed discovery would produce accurate, useable information, it clearly appears that the procedure is substantially superior to any of the discovery techniques specifically authorized by the rules. In the case of Section 6(b) orders, we expect that such a showing could be made only in the extraordinary case.

Commission with a recommendation whether an adequate case has been made for this remedy.[3] In view of the responsibility of the ALJ's to maintain control of pretrial proceedings and the especially broad discretion they have in deciding matters of discovery, the Commission intends to attach great weight to these recommendations.[4]

Finally, respondent has argued that "[n]either party in * * * adjudicatory proceedings should be entitled to utilize compulsory discovery devices unavailable to the other, and yet that is exactly what complaint counsel propose to do." The ALJ, in recommending that we deny complaint counsel's appeal, contended that "[c]omplaint counsel's proposed resort to a Section 6 survey, a device not available to respondents, for complaint counsel's discovery needs and for reasons of alleged inadequacies of Part 3 discovery devices for the purposes of this case, is fundamentally unfair." However, although it would not be unfair in any particular case to allow only one party—the party that was able to make the required showing of need—to use a Section 6(b) order as a discovery device, we believe that special report orders may issue at the request of *any* party[5] who can make the difficult showing that such an order is necessary to its preparation for trial.[6]

IV. CONCLUSION

The ALJ has already ruled that the discovery procedures expressly authorized by the Part 3 rules are adequate for purposes of this case. If complaint counsel choose to file a motion for the issuance of a Section 6(b) order, the Commission, in acting on the motion, will

[3] The ALJ's are required by Section 3.22(a) of the Rules of Practice to certify to the Commission any motions upon which they lack authority to rule together with any recommendations they believe it appropriate to make as to the appropriate disposition of such motions.

[4] In this case, the ALJ properly stayed further discovery pending the Commission's disposition of complaint counsel's appeal. However, proceedings need not normally be stayed pending the Commission's disposition of a motion or an interlocutory appeal, see Rules of Practice, Section 3.23(b), and we expect that there would be few cases in which a stay pending Commission action on a motion for a Section 6(b) order would be warranted. Where the ALJ recommended that a Section 6(b) not issue, in view of the deference the Commission will accord this recommendation, the judge might reasonably require the parties to proceed with their pretrial discovery even if the discovery covered much the same ground as the requested Section 6(b) order. Nevertheless, where the ALJ has recommended that a Section 6(b) order issue, a stay of any discovery that was contingent on the Commission's decision to override the judge's recommendation, and not permit discovery by means of Section 6(b), might well be warranted.

[5] In the unusual case where a party can show that Section 6(b) orders are needed, it may be that all parties can make an adequate showing of need. In such cases, we would hope that, with the ALJ's encouragement, the parties could agree on a single special report form. We will be unwilling to burden third parties with multiple report forms each designed to meet the discovery needs of a different party.

[6] Respondent has argued that the use of Section 6(b) would result in delay because of likely resistance by third parties. However, we are unprepared on this basis to foreclose its use where a party has made a strong showing of need.

accord great deference to the ALJ's assessment of the need for complaint counsel's proposed order.

It is so ordered.

IN THE MATTER OF

INTERNATIONAL HARVESTER COMPANY

Docket 9147. Interlocutory Order, Aug. 12, 1981

ORDER GRANTING MOTIONS FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE ON THE ISSUE OF PUBLIC INTEREST

By motions dated July 14 and 15, 1981, complaint counsel have asked the Commission to receive and consider new evidence of fuel fires involving respondent International Harvester's (IH) gas-powered tractors. In its opposing memorandum, IH also provides additional evidence of recent fuel fires involving these tractors.

The "Gary Killingbeck" incident and other alleged fuel fires recounted for the first time by complaint counsel and IH possibly raise questions both about the appropriate scope of relief in this case and the adequacy of IH's past disclosure of alleged safety hazards to affected tractor owners. Thus, this evidence may be relevant to the public interest question certified to the Commission by Judge Mathias. IH does not deny that this evidence may be relevant to the public interest question. Instead, it claims the evidence of the Killingbeck fire is tainted by the way in which it was collected by complaint counsel and thus should not be considered by the Commission. In the absence of a trial record, the Commission will not attempt to evaluate IH's allegations, or determine the ultimate weight that should be accorded the new evidence of fuel fires in any findings of fact. However, the existence of such evidence, and the dispute between the parties over its significance, may be relevant to an assessment of the need for further litigation concerning the sufficiency of IH's notification efforts and the appropriateness of prospective relief.

Accordingly; *it is ordered,* That complaint counsel's motion and supplemental motion for leave to submit additional evidence on the issue of public interest are hereby granted.

IN THE MATTER OF

GROLIER, INCORPORATED, ET AL.

Docket 8879. Interlocutory Order, Aug. 13, 1981

ORDER DENYING MOTION TO DISQUALIFY JUDGE VON BRAND

This matter is before us once again on Respondent's Motion for Disqualification and Removal of the Administrative Law Judge ("Renewed Motion"). Grolier was given the opportunity to raise this issue a second time when the United States Court of Appeals for the Ninth Circuit remanded the case because it believed that there was an erroneous "flat refusal" by the Commission to disclose to Grolier anything at all about Administrative Law Judge von Brand's prior participation in the Grolier case while he served as an attorney-advisor to former Commissioner MacIntyre. *Grolier, Inc.* v. *FTC,* 615 F.2d 1215, 1222 (9th Cir. 1980).

The Commission denied Grolier's discovery request when it held that, as a matter of law, attorney-advisors were not engaged in investigating or prosecuting matters so as to bring them within the proscription of Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). See *Grolier, Inc.,* 87 F.T.C. 179, 181 (1976). The Ninth Circuit held however that Section 554(d) precluded attorney-advisors to the Commissioners "from [subsequently] participating in the adjudication of cases [as administrative law judges] in which they have actually performed * * * ['investigative and prosecuting'] functions, and in 'factually related cases,'" and stated that "[o]nce an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions,' through prior acquaintance with *ex parte* information, 554(d) says he 'may not * * * participate or advise in the decision * * * .'" *Id.,* 615 F.2d 1221. The Ninth Circuit therefore held that Judge von Brand's "actual involvement" with "information received outside of the controlled adjudicative setting" (615 F.2d 1220, 1221) was the critical determination to be made on disqualification. The court remanded the case for us to reconsider the denial of discovery and thereafter the disqualification motion.

Since the case was remanded, Grolier has made extensive submissions, mostly consisting of documents from the Commission's files, which it had prior to the Ninth Circuit's decision. Despite directions to Grolier to state the impact these documents might have on the disqualification issue,[1] Grolier has presented only a recast version of

[1] Order Reopening Proceeding and Directing Submission of Further Information, September 12, 1980.

an argument previously rejected by both the Commission and the court of appeals. Although advanced at length, the argument is simply that because Judge von Brand served as an attorney-advisor he is presumed to have a close relationship with his Commissioner and further presumed to be aware of everything circulated among the Commissioners[2] and, because the Commission considered several matters involving Grolier while he was an attorney-advisor, Judge von Brand must be presumed to have been exposed to information outside of the controlled adjudicative setting and, hence, disqualified. See Renewed Motion. Grolier also argues that, although the Commission has searched its files thoroughly and repeatedly for relevant material, Grolier is entitled to further discovery because it is still unable to connect Judge von Brand with any prior Grolier matter. We shall address these issues after a brief review of the history of this matter to put Grolier's present arguments in perspective.

History of the Disqualification Motion

Judge von Brand served as an attorney-advisor to Commissioner MacIntyre from 1963 to 1970. The Commission issued its complaint against Grolier on March 8, 1972.[3] Hearings on the complaint extended from 1973 to 1976 and were conducted before two Administrative Law Judges.[4] Judge von Brand's prior role at the Commission was related in a Commission press release announcing his appointment as a judge on March 18, 1975, and reported in the Antitrust and Trade Regulation Reporter on March 25, 1975 (706 ATRR 32, 33) (R. 3301-02). The first prehearing conference before Judge von Brand was held on March 19, 1975. *Id.* Judge von Brand reheard much of the testimony at Grolier's insistence (R. 1804-29, 1967-81). Almost a year later, just five days before the end of hearings before Judge von Brand, Grolier's president testified that Commissioner MacIntyre may have met with him in 1966 or that he may have met Commissioner MacIntyre.[5] Judge von Brand immedi-

[2] The argument has apparently escalated because now Grolier would charge Judge von Brand with knowledge of every document possessed by the staff even though there is no indication it was previously seen by the Commissioners. *E.g.*, Renewed Motion, 7, 8; Johns Affidavit, Exhibits D-F, I; Righthand Affidavit, Exhibits I and M; see footnotes 12 and 13, *infra*.

[3] The original record revealed, in affidavit form, the undisputed fact that the recommendation to issue a complaint, based on the results of the staff's investigation, was not forwarded to the Commission until *after* Judge von Brand left Commissioner MacIntyre's office. R. 4663-64. Exhibit BB to the Righthand Affidavit indicates that the Commission was advised that the investigation was progressing while Judge von Brand was an attorney-advisor. Nothing in the record or in Commission practice indicates that the Commission knew the substance of the information Grolier provided at that time to the investigatory staff.

[4] The first judge assigned to hear the case retired after a year of hearings had been held (R. 1793).

[5] The actual testimony was: "I only recall having met Mr. MacIntyre and I don't remember, or I think, I am quite sure at one of the earlier discussions with the Chairman he was there, but it was a very informal discussion just trying to say who I was and where I hoped to be able to take the company in the following 20 years." (Tr. 16115).

ately disclosed that he had worked for Commissioner MacIntyre but stated that he had no recollection of any events involving Grolier.

Armed with this bit of testimony Grolier filed a motion to disqualify Judge von Brand along with a discovery request for all documents relating to Grolier which were before the Commission during the period from 1963 to 1971. Judge von Brand entered a statement in the record pointing out that his former position had been a matter of public (and published) record since he presided over the case; that he had no recollection of working on Grolier matters; that he had asked a former secretary to search Commissioner MacIntyre's former suite of offices for any records relating to Grolier; that no such records were located nor were there any logs that would show who worked on any particular matter, and that he has searched his own files and could find nothing related to Grolier in them. Statement of Administrative Law Judge Concerning Motion for Disqualification, January 30, 1976. On February 10, 1976, the Commission declined to disqualify Judge von Brand and denied discovery. *Grolier, Inc.*, 87 F.T.C. 179 (1976).

On April 30, 1976, Grolier replicated its discovery motion for documents in a Freedom of Information Act ("FOIA") request. On May 17, 1976, the Secretary of the Commission granted the request in part and denied it in part. Grolier appealed this determination to the Commission. On June 28, 1976, the Commission granted Grolier access to most of the documents but withheld, in whole or in part, 41 documents. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission"), Exhibit A, paras. 26–29; Exhibit C. On August 20, 1976, Grolier filed a lawsuit under FOIA to obtain the 41 documents withheld. *Grolier, Inc.* v. *FTC,* Civil Action No. 76–1559 (D.D.C.). On November 1, 1976, an affidavit and an index of the 41 documents withheld were filed by the Commission. Submission, Exhibits B and C. On May 6, 1977, the Commission responded to interrogatories propounded by Grolier about the nature of the Commission's search for documents and about how Commission records are maintained. Submission, Exhibit D. On July 22, 1977, the district court ordered an additional search for documents which was conducted with negative results. Submission, Exhibit E. On March 10, 1978, the district court granted summary judgment for the Commission, holding that the documents withheld were exempt from production under FOIA. Submission, Exhibit F. Grolier appealed. Then, because the District of Columbia Circuit had changed its interpretation of the status of Commission "blue minutes,"[6] the

[6] *Bristol-Myers Co.* v. *FTC,* 194 U.S. App. D.C. 285, 598 F.2d 18 (1978).

Commission sought a remand. On remand the Commission, on March 13, 1979, voluntarily released 11 of the 14 blue minutes in their entirety. Minor deletions were made in the three remaining minutes. Submission, Exhibit G. The district court subsequently ordered the release of all the blue minutes. Submission, Exhibit H. Grolier again appealed.[7]

Meanwhile, in the adjudicative proceeding, Judge von Brand issued his initial decision on October 12, 1976. *Grolier, Inc.*, 91 F.T.C. 331 (1978). Grolier appealed this decision to the Commission which issued a Final Order and Opinion on March 13, 1978. *Grolier, Inc.*, 91 F.T.C. 476 (1978). Grolier did not attempt to use the documents it obtained in June 1976, or the Index describing the withheld documents it obtained in November 1976, when it made its disqualification and discovery arguments to the Commission and the court of appeals.

On remand from the Ninth Circuit Judge von Brand has executed an affidavit reaffirming that he has no recollection of working on Grolier matters as an attorney-advisor. In view of the time period involved and the volume of documents that passed through Commissioner MacIntyre's office, he cannot positively say he never saw a circulation relating to Grolier. Judge von Brand also relates conversations he had with a former secretary to Commissioner MacIntyre and the Commissioner himself and states that both recall that another attorney-advisor, Mr. Powers (now deceased), worked on Grolier matters. Judge von Brand also describes searches he made for records that might show his involvement with Grolier matters. First, he searched his personal files and found nothing related to Grolier. Second, he had another former secretary search Commissioner MacIntyre's former suite of offices for Grolier related documents or anything that would show which attorney-advisor worked on Grolier matters. The results were negative. Finally, he directed the Secretary of the Commission to search the Grolier files for anything that would show whether he had prepared documents related to Grolier. Again, nothing was found. Affidavit of Theodor P. von Brand.

Commissioner MacIntyre has also filed an affidavit stating that he compartmentalized work assignments in his office. He assigned investigational matters to Mr. Powers and, after his departure, to Mr. Volhard. Motions were assigned to Mr. Michaels and adjudicatory matters were assigned to Judge von Brand. To the best of his recollection, Commissioner MacIntyre did not discuss matters relat-

[7] The appeal was dismissed after the Commission released all the documents in this proceeding. See Order, March 10, 1981.

ing to Grolier with Judge von Brand and he was not aware that Judge von Brand had contact with any Grolier matters as an attorney-advisor. Finally, Commissioner MacIntyre states that all his official files remained in his office when he left the Commission, that the personal files he removed have since been destroyed and that he has no documents related to Grolier now. Affidavit of Everette MacIntyre.

Finally, although none of the 28 documents withheld in the FOIA case shed any light on Judge von Brand's involvement with Grolier matters, we provided them to Grolier as a matter of discretion. Order, March 10, 1981.

Further Discovery Is Unnecessary

Grolier again contends it is entitled to discovery beyond its original request for documents and that if this discovery is denied an adverse inference must be drawn against Complaint Counsel. Renewed Motion, 18–27. No further discovery is necessary. Our March 10, 1981, Order in essence granted Grolier's original request for documents but rejected additional requests Grolier made.[8] We are satisfied, both independently and in light of the court of appeals decision, that there is sufficient information available in the record to make an accurate determination under Section 554(d) of the Administrative Procedure Act (5 U.S.C. 554(d)) that there is no basis to disqualify Judge von Brand.

The affidavits of the two principals, Commissioner MacIntyre and Judge von Brand, demonstrate that neither recalls discussing any Grolier matters with the other. Furthermore, both state that Judge von Brand handled only adjudicatory matters for Commissioner MacIntyre. More importantly, our files have been searched several times for any document that Judge von Brand might have seen, and a district court has approved the adequacy of some of those searches. Grolier has been given every document relating to Grolier that circulated among the Commissioners while Judge von Brand served as an attorney-advisor as well as many documents that were not. Not a single document connects Judge von Brand with a single Grolier circulation.

Grolier has substantially more information than was available in other cases where courts have upheld an agency decision to deny discovery on the possible disqualification of a decisionmaker. For example, in *San Francisco Mining Exch.* v. *SEC,* 378 F.2d 162, 168,

[8] Grolier sought ten categories of documents and to depose Commissioner MacIntyre, Judge von Brand and three other individuals formerly employed in Commissioner MacIntyre's office.

170-71 (9th Cir. 1967), the party urging disqualification contended that additional discovery had been improperly denied because it appeared that the agency had authorized the commencement of adjudication in 1962 based on a staff letter and that some decisionmakers had earlier served on the prosecuting staff of the agency (as late as July 15, 1960). The Ninth Circuit rejected the contention. It held that even if a decisionmaker had participated in investigating or prosecuting earlier proceedings, that fact would not be enough to justify additional discovery, especially because the earlier proceedings were alluded to in the opinion and thus were either in the administrative record or would have been known through official notice. The court also held that, absent a factual showing of some ground to believe that an improper commingling of functions did occur, further discovery was not appropriate. It was not enough to allege, as Grolier does here, that the decisionmaker "might have" participated in an earlier investigation or adjudication. *Id.* 378 F.2d at 170. See also, *Au Yi Lau* v. *I.N.S.*, 558 F.2d 1036, 1042-43 (D.C. Cir. 1977) (affidavit by decisionmaker previously employed as prosecutor that he had "no knowledge of or familiarity with" the case in that capacity held sufficient to defeat a motion to disqualify); *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (affidavit by attorney-advisor that he had not participated in decision held sufficient); *R.A. Holman and Co.* v. *SEC*, 377 F.2d 655, *cert. denied*, 389 U.S. 991 (1967) (discovery and disqualification properly denied where decisionmaker's affidavit stated that he had not "acquired substantial knowledge of the facts in issue," even though he had been a prosecutor when the investigation began).

Thus, it is clear to us that, under established judicial precedents, the fact that Grolier can find no indication of Judge von Brand's participation in earlier matters related to it does not mean that it is entitled to still further discovery, rather it means simply that there is no basis for disqualifying Judge von Brand. See *Grolier, Inc.* v. *FTC, supra*, 615 F.2d at 1221.

Grolier also argues that because we have refused to allow further discovery, an adverse inference should be drawn. Renewed Motion, 22-27. Complaint Counsel has responded by asserting that an adverse inference should not be drawn where, as here, a proper assertion of privilege is made to withhold documents. Answer to Respondent's Motion for Disqualification of the Administrative Law Judge, 3-4. Although Complaint Counsel is correct, there are other reasons not to draw an adverse inference against Complaint Counsel.

First, the adverse inference rule applies to the parties, not the deciding tribunal. Complaint Counsel is not withholding any infor-

mation from Grolier. Indeed, the very case Grolier relies upon in urging that the inference be drawn, *International Union (UAW)* v. *NLRB,* 459 F.2d 1329, 1338 (D.C. Cir. 1972), holds that the inference dissipates if, as here, a decisionmaker sanctions the withholding of evidence. Second, even if an inference adverse to Complaint Counsel could have been drawn from our earlier refusal to grant discovery, it was eliminated when we provided Grolier with every document it originally sought. Finally, Grolier's argument stands the inference in its head. The Supreme Court has held that an adverse inference arises when a party provides weak evidence but refuses to produce strong evidence in its control. See, *e.g., Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226 (1939). Here we have given Grolier the strong evidence (every document that exists and proof that no other records exist) but it seeks to obtain weak evidence (the testimony of those who have sworn they cannot recall any involvement by Judge von Brand with Grolier matters).

In any event, if we were to infer anything from the fact that Grolier's review of all the documents before the Commission fails to establish a single connection between Judge von Brand and Grolier matters, it would be to infer not that evidence of a nexus between the two must exist, but that none exists.

There Is No Basis To Disqualify Judge von Brand

Despite the tremendous volume of paper that accompanies Grolier's motion, its substantive argument for disqualification covers barely a page (Renewed Motion, 27–28) and can be summarized in a sentence. Basically, the argument is that because several matters involving Grolier were before the Commission while Judge von Brand served as attorney-advisor, it must be assumed that he saw them and that he should therefore be disqualified. With such an uncritical treatment of the issue, we could safely reject the motion by relying on the court of appeals statement that "Where [there is] * * * no evidence of actual involvement in Grolier matters by then attorney-advisor von Brand, the normal course of action would be to refuse to disqualify him." *Grolier, Inc.* v. *FTC, supra,* 615 F.2d at 1221. But to finally resolve any doubts on the issue, we shall discuss Grolier's specific contentions.

Grolier argues that because Judge von Brand's 1976 statement referred to the fact that he worked on adjudicative and "informal

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matters" there is circumstantial evidence he was exposed to anything it characterizes as an informal matter.[9] See Renewed Motion, 5, 7, 14, 16, 17, 18, 27. We reject this argument for several reasons.

First, as Complaint Counsel points out (Answer, 1–3) this argument is the same *per se* argument, advanced under another name, that the court of appeals squarely rejected. See, *Grolier, Inc., supra,* 615 F.2d at 1221.[10] Like the Ninth Circuit, we hold that "[f]or the purposes of disqualification [attorney-advisors] are not chargeable with involvement in all cases that were before the agency during their advisorship." 615 F.2d at 1221.

Second, we note that none of the attachments to the Furth Affidavit would serve as a basis for disqualification because the Ninth Circuit held that one of Congress' concerns in enacting Section 554(d) was to prevent the "possible use in the decisional process of information received outside of the controlled adjudicative setting * * * ." 615 F.2d at 1220. All the documents appended to the Furth Affidavit were introduced as evidence in the controlled adjudicative setting (introduced mainly by Grolier) and therefore there is no danger that Judge von Brand improperly used these documents in arriving at a decision.[11] See *San Francisco Mining Exch.* v. *SEC, supra,* 378 F.2d at 169.

Third, it is undisputed that none of the documents Grolier submitted involve the prosecution of this case. The recommendation to issue a complaint was not forwarded to the Commission until after Judge von Brand ceased to serve as an attorney-advisor.[12] Affidavit of Edward Steinman. Very few of the documents Grolier has filed even concern the formal investigation of this case and none of them contain facts or information not adduced at the hearing that could have been interpolated by Judge von Brand.[13] See *Final Report of*

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[9] Grolier argues that an earlier consent order and assurance of voluntary compliance must be considered informal matters that Judge von Brand must have seen. While these procedures are informal methods of ending investigations, both arise under Part 2 of our Rules of Practice, 16 C.F.R.2.1 *et seq.* governing "Nonadjudicative Procedures". As such, they would normally be handled by an attorney-advisor connected with an investigation, not adjudicatory matters.

In any event, Grolier's speculation about what Judge von Brand meant in 1976 when he said he worked on "informal matters" as well as adjudicative matters is insufficient to create a factual issue, particularly in light of the affidavits of Judge von Brand and Commissioner MacIntyre.

[10] Grolier now places sole reliance on the 1976 statement and matters that were in the record before the court of appeals. We note that Grolier challenged the verity of this statement when it was before the court of appeals and it should not be allowed to rely upon it now for the first time. See Petitioners' Reply Brief, No. 78–2159 (9th Cir.) at 25–26 n.12. We ordered Grolier to address the issue of timeliness (Order, September 12, 1980 at 3), but it chose not to do so. We, therefore, hold this aspect of the matter is untimely.

[11] In any event, the Supreme Court has made clear that due process is not violated by the mere fact that a decisionmaker has knowledge of investigative facts. *Withrow* v. *Larkin, supra,* 421 U.S. at 55.

[12] One document in the record (Johns Aff., Exh. W.) is dated after the staff recommended that the complaint issue, but that matter was not before the Commission until after Judge von Brand left his position as attorney-advisor and therefore has no bearing on the issue.

[13] The Commission's investigation leading to this adjudication began on February 22, 1970, with a staff memorandum (Righthand Aff. Exh. AA) requesting the issuance of an investigational resolution and of an Order to

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the Attorney General's Committee on Administrative Procedure, 56 (1941); *Grolier, Inc.* v. *FTC, supra,* 615 F.2d at 1219–20. See also *San Francisco Mining Exch.* v. *SEC, supra,* 378 F.2d at 168, 170–71.

Fourth, all the other documents Grolier has referred to concern other matters involving Grolier.[14] Our Order reopening this proceeding directed Grolier to comment on whether any of the documents it submitted fell within the legal definition of "factually related case" as that term is used in the Administrative Procedure Act. 5 U.S.C. 554(d). Grolier chose not to address this issue, apparently relying on the assumption that any time the same party was before the agency a factually related case is involved. The assumption does not withstand analysis.[15] The matters before the Commission while Judge von Brand was an attorney-advisor resulted in a consent order, an assurance of voluntary compliance ("AVC") and compliance reports that followed them. Renewed Motion, 7–13. Under the Commission's present (and former) Rules, both a consent order and an AVC brought to an end the matter under investigation and required the submission of compliance reports. Neither the consent order (concerning the pre-1964 debt collection practices of Grolier) nor the AVC (concerning the pre-1967 home solicitation and recruiting practices of Grolier) could have formed, or did form, the basis of the complaint in this matter which, by and large, depended on post-1969 evidence. See *Grolier, Inc., supra,* 91 F.T.C. at 437 and n.99. That a respondent may have recidivist tendencies does not make the earlier proceedings "factually related" cases.[16] This interpretation is confirmed by the Attorney

File a Special Report. That memorandum recounted public facts about prior matters involving Grolier, stated that the information on hand was outdated and discussed what information each question in the Special Report was designed to elicit. The Commission authorized both (Johns Aff., Exh. S); (Righthand Aff., Exhs. R and S). No other documents were before the Commission during the formal investigation and therefore could not have been before Judge von Brand. Grolier's Response to the Special Report (Furth Aff., Exh. T), in addition to being presented in the controlled adjudicative setting, clearly went to the staff and not to the Commission (See Johns. Aff., Exh. BB). In April and July 1970, representatives of the Attorney General of Texas and Maryland, respectively, were to examine our files (Johns Aff., Exhs. U and V). On November 7, 1970, staff submitted a progress report to the Commission indicating that it had: received a response to the Special Report; requested and received a supplemental submission; conducted interviews and proposed a questionnaire; and it expected to transmit a proposed complaint in 45 days. There is no allusion to the substance of any of these matters (Righthand Aff. Exh. BB).

[14] Several of the documents submitted by Grolier duplicate each other. Compare Righthand Aff., Exhs. L, M, N and P with Johns Aff., Exhs. J, N, O and P. Several documents are memoranda to the file which were prepared and retained by the Commission's staff and therefore were not available to the Commission (or Judge von Brand). Righthand Aff., Exhs. I and M; Johns Aff., Exhs. D, E, F, B and I. Many of the documents contain no substantive facts or information regarding Grolier but only reflect assignments of a matter (to a Commissioner or to staff) or other procedural matters. Righthand Aff., Exhs. D, F, G, H, K, Q, R, S, T, U, V, X and Z; Johns Aff., Exhs. G, H, K, Q, R, S, T, U, V and W.

[15] The Court of Appeals for the District of Columbia recently stated that "it would be a mistake to assume automatically" that Section 554(d) prevents any *ex parte* communication between the Commission and its staff simply because adjudication arose at one point. *RSR Corp.* v. *FTC,* 656 F.2d 718 (D.C. Cir. No. 80-2131, April 30, 1981) (slip op. at 10–11). See also *EDF* v. *EPA,* 510 F.2d 1292, 1305 (D.C. Cir. 1975); *Alaska S.S. Co.* v. *FMC,* 356 F.2d 56, 61 (9th Cir. 1966).

[16] We note that even in judicial disqualification cases involving criminal matters there is no prohibition

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General's Manual on the Administrative Procedure Act, 54, n.6 (1947)[17] which discusses how the term is to be construed. It states:

> The limitation of the prohibition against consultation to those who perform investigative or prosecuting functions "in that or a factually related case," should be construed literally.
>
> * * * * * * *
>
> The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded [from assisting in the decision in both proceedings] ***. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged as either investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those they had theretofore investigated or prosecuted.

This interpretation also conforms with the Ninth Circuit's holding that the evils to be avoided by Section 554(d) are both the likelihood that former investigators or prosecutors will interpolate facts not in the record and that because they are likely to have developed a "will to win," they cannot resolve the issues objectively. 615 F.2d at 1120.[18]

Finally we are not convinced, as Grolier apparently is, that the mere existence of *ex parte* communications, assuming any took place here with respect to facts at issue in this case, necessarily leads to Judge von Brand's disqualification. Normally under the APA when an *ex parte* communication occurs the remedy is not to disqualify the decisionmaker but to place the communication "on the record" and to give the party not privy to it an opportunity to comment. See *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978); *United States Lines, Inc.* v. *FMC*, 584 F.2d 519, 542–43 (D.C. Cir. 1978); *Home Box*

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against an individual prosecuting another for one offense and subsequently sitting as a judge in a case involving the same offender. *See, e.g., Gravenmier* v. *United States*, 469 F.2d 66, 67 (9th Cir. 1972); *United States* v. *Winston*, 613 F.2d 221 (9th Cir. 1980). Because we conclude that the earlier matters involved here are not factually related, it is not necessary for us to decide whether they are "cases".

[17] The Manual is based on a review of the legislative history of the Administrative Procedure Act. Courts give it deference because of the role of the Department of Justice in drafting the APA. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 n.19 (1978).

[18] In *San Francisco Mining Exch.* v. *SEC*, *supra*, 378 F.2d at 170–71 n.9, the Ninth Circuit quoted the *R.A. Holman* opinion in rejecting an argument that discovery was mandated by the fact that the decisionmaker had previously prosecuted the same parties. The court held that to disqualify a decisionmaker based on his former status "would be tantamount to disqualifying from participation in a SEC adjudicatory proceeding, all personnel from the Divisions of Corporation Finance and Trading and Exchanges without regard to the extent of their connection with the proceeding in its investigatory stages, and would tend to prevent the appointment to the Commission of persons who have had previous experience with its work." In this case, if Grolier's Renewed Motion were granted it would have a similar effect, but with even less basis.

Office, Inc. v. *FCC,* 567 F.2d 9, 58–59 (D.C. Cir.); *cert. denied,* 434 U.S. 829 (1977).

If Judge von Brand had received *ex parte* communications in this case while serving as Judge, under our rules he would not be disqualified, but rather required to place the communications on the record and Grolier would have an opportunity to comment. See 16 CFR 4.7. Likewise, if the Commission had considered some matter *dehors* the record our decision would not be automatically void for the Ninth Circuit has held that: "to constitute fatal error it must appear that an administrative agency's journey outside the record worked substantial prejudice." *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253, 1265 (9th Cir. 1977). Under these circumstances it would indeed be anomalous to automatically disqualify Judge von Brand simply because he had been exposed to some *ex parte* communication in his earlier status as an attorney-advisor. Here Grolier has all the *ex parte* communications and we specifically directed Grolier to comment on any that indicated he received factual "information * * * outside of the controlled adjudicative setting" that could have been interpolated. Order, September 12, 1980. Despite its voluminous submissions Grolier has not pointed to any specific facts or information that could have been interpolated. We conclude therefore, that even if we were to assume that Judge von Brand saw all the documents the error would be harmless. See 5 U.S.C. 706.

Conclusion

Our records have been thoroughly searched and Grolier has been given access to all matters that came before the Commission during the time that Judge von Brand served as an attorney-advisor. Grolier has presented no evidence that he was *actually* involved with any Grolier matters. Under the Ninth Circuit's opinion, there is, therefore, no basis on which to disqualify Judge von Brand. 615 F.2d at 1221. Neither has Grolier been hindered in its efforts to secure evidence. The Ninth Circuit urged us to consider giving Grolier documents if Grolier could point to inadequacies or inconsistencies in the affidavits before us. While the Commission did not believe any such defects existed, Grolier was given the documents as a matter of discretion. Even if we were required to assume Judge von Brand was initially familiar with every document (and the Ninth Circuit held that we were not required to do so) disqualification would not follow. None of the documents involve the prosecution of this case or even the decision to issue a complaint. Those few that were created during the time the staff was conducting the formal investigation do not

discuss or refer to the substance of the investigation. A large number of the earlier documents do not contain any facts or information that could have been interpolated. Moreover, the bulk of the documents were presented to Judge von Brand in the controlled adjudicative setting and therefore, even if he had seen these items earlier, no improper interpolation could exist. The few remaining documents concern earlier, completed, proceedings against Grolier. Under a proper interpretation of "a factually related case" as it is used in Section 554(d) of the APA, exposure to those earlier proceedings is not disqualifying. In short, Grolier has not presented a scintilla of evidence to support its argument that Judge von Brand should be disqualified. We therefore deny the motion to disqualify Judge von Brand.

This ruling disposes of all matters we were required to consider by the Ninth Circuit's remand of the case and we might simply reaffirm our earlier Final Order. However since the Final Order issued the Commission has modified the Final Order in another encyclopedia case, *Encyclopaedia Britannica,* Docket No. 8908. We therefore invite the parties to address the issues of whether similar modifications to the Final Order are appropriate in this case and, if so, whether they should be made now or, as in *Britannica,* await appellate review of the Final Order.

Therefore, *it is ordered,* That Grolier's renewed motion to disqualify Judge von Brand is denied, and

It is further ordered, That Grolier state, within 14 days of this Order, whether it believes a modification of the Final Order is appropriate, the reasons therefor, and when it should be modified, and

It is further ordered, That Complaint Counsel thereafter respond to Grolier's submission within 14 days.

IN THE MATTER OF

BORDEN, INCORPORATED

FTC File No. 1–23281. Interlocutory Order, Sept. 1, 1981

ORDER REOPENING PROCEEDING AND MODIFYING STIPULATION

Respondent having requested reconsideration of stipulation no. 8260, executed by the Realemon-Puritan Company on March 3, 1952, and accepted by the Federal Trade Commission on April 1, 1952 [48 F.T.C. 1660];

Accordingly, *it is ordered* that the matter is reopened and that the stipulation herein is modified to read:

BORDEN, INC., the successor to the Realemon-Puritan Co., the amended name of a corporation organized under the laws of the State of Illinois as Puritan Co. of America, with its principal place of business in Chicago, Illinois, engaged in the business of offering for sale and selling in commerce a lemon-juice product unsweetened, and made by reconstituting lemon juice concentrate, designated on its label Realemon Brand Reconstituted Lemon Juice, or Realemon Brand Lemon Juice from Concentrate, entered into an agreement in connection with the offering for sale, sale and distribution of that product, that it will cease and desist in its advertising of such product from:

(1) Designating its reconstituted lemon juice or lemon juice from concentrate as "Realemon" without stating conspicuously and prominently that said product is reconstituted or from concentrate;

(2) Using the terms "Realemon Brand Lemon Juice", "lemon juice", or any similar term in describing its reconstituted lemon juice or lemon juice from concentrate without using conspicuously and prominently the term "reconstituted" or "from concentrate" as an adjacent modifying descriptive word or words;

(3) Representing that its reconstituted lemon juice or lemon juice from concentrate is the juice of tree ripened lemons.

IN THE MATTER OF

THE BRITISH PETROLEUM COMPANY LIMITED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3074. Complaint, Sept. 3, 1981—Decision, Sept. 3, 1981

This consent order requires, among other things, a London. England petroleum corporation and its American subsidiary to timely divest, in accordance with the terms of the order, all stock issued by Amax, Inc., the leading domestic producer of molybdenum. The order also bars respondent's officers and employees, for a period of ten years, from simultaneously serving in a similar role in any other molybdenum company. Further, for specified time periods, the companies are prohibited from acquiring any part of the stock, or more than 50% of the assets of any molybdenum company without prior Commission approval; and restricted from entering into any joint venture for the production and sale of molybdenum in the United States.

Appearances

For the Commission: *Elizabeth R. Rindskopf, Daniel S. Koch, Rendell A. Davis, Jr., Richard L. Sippel, Lee Goldman, Peter A. Sklarew, Robert H. Glidden,* and *Steven B. Feirman.*

For the respondent: *Robert E. Liedquist, Squire, Sanders & Dempsey,* Washington, D.C., for The Standard Oil Company, and *Stuart W. Thayer* and *James H. Carter, Sullivan & Cromwell,* New York City, for The British Petroleum Company Limited.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have undertaken an acquisition of Kennecott Corporation ("Kennecott") that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said undertaking therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charge as follows:

I. THE BRITISH PETROLEUM COMPANY LIMITED

1. Respondent The British Petroleum Company Limited ("BP") is a corporation organized under the laws of England with its principal offices at London, England.

2. BP is a diversified company with over 900 subsidiaries and associated companies in 70 countries ("BP Group"). BP owns a 53% interest in The Standard Oil Company ("Sohio"), through which it plans to acquire Kennecott. BP owns 6.8% of the stock of AMAX Inc. ("Amax"). BP owns all of the stock of Selection Trust Limited. John Peter Du Cane, the chief executive officer of Selection Trust Limited, currently serves on the board of directors of Amax.

3. BP's principal business consists of the production and sale of petroleum products, chemicals, minerals, coal, and animal feed. In 1979, petroleum accounted for over 91% of BP's net sales.

4. In 1979, the BP Group had consolidated revenues of $50.4 billion and consolidated net income of $3.6 billion. BP is reported to be the sixth largest corporation in the world.

II. THE STANDARD OIL COMPANY

5. Respondent Sohio is a corporation organized under the laws of Ohio with its principal offices at Cleveland, Ohio.

6. Sohio is a diversified oil company with interests in coal, uranium, chemicals and plastics.

7. Sohio is a 53%-owned subsidiary of BP.

III. KENNECOTT CORPORATION

8. Kennecott is a corporation organized under the laws of New York with its principal offices at Stamford, Connecticut.

9. Kennecott is the leading domestic copper producer and is engaged in copper fabrication. It is the third ranking firm in molybdenum production, with 5.6% in 1980. Its other primary lines of business include abrasives, lead, gold, titanium, silver, iron powder, and chemicals.

10. In 1979, Kennecott had sales of $2.4 billion, assets of $2.8 billion, and income of $130 million. It ranked 143 in the 1980 Fortune 500.

IV. AMAX INC.

11. Amax is a corporation organized under the laws of New York with its principal offices at Greenwich, Connecticut.

12. Amax is engaged in a wide variety of mining and related activities. It is the leading domestic producer of molybdenum, with 67.79% of domestic production. Amax is also a major producer and refiner of metals including copper, nickel, lead, tungsten, zinc, and iron. It is also the third largest domestic coal producer and is a leading independent producer of oil and natural gas.

13. In 1980, Amax had sales of $2.95 billion, assets of $5.28 billion, and income of $470 million. It ranked 131 in sales and 45 in assets among the Fortune 500.

V. JURISDICTION

14. At all times relevant herein, BP, Sohio, Kennecott, and Amax have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

VI. THE ACQUISITION

15. On March 12, 1981, Sohio announced its agreement to acquire Kennecott. In this manner, Kennecott will become a subsidiary of BP. According to the merger agreement, Sohio will pay $62 cash per share for 100% of Kennecott stock, yielding an estimated total purchase price of $1.77 billion. Requisite approval by two-thirds of Kennecott's shareholders was granted at a special meeting on May 5, 1981.

VII. TRADE AND COMMERCE

16. The relevant product market is the production of molybdenum disulphide ("molybdenum").

17. The relevant geographic market for molybdenum production is the United States.

18. The production of molybdenum in the United States is substantially concentrated. In 1980, the top four firms accounted for 91.55% of production, and the top eight firms accounted for 99.24%. Amax and Kennecott ranked first and third, with 67.79% and 5.6%, respectively.

19. Barriers to entry into molybdenum production are high. Capital costs are high and increasing; reserves are not readily available; and a long lead time is necessary to establish a going concern.

VIII. ACTUAL COMPETITION

20. Amax and Kennecott both are actual competitors in the production of molybdenum in the United States market.

IX. POTENTIAL COMPETITION

21. The relevant market is concentrated, as set forth in Paragraph 18 of this Complaint.

22. Barriers to entry in the relevant market are high, as set forth in Paragraph 19 of this Complaint.

23. Feasible means of entry exist for BP to enter the United States molybdenum production market as an alternative to its acquisition of Kennecott.

24. BP is one of the most likely potential entrants into the relevant market, and there is a reasonable probability that BP is likely to enter this market in the near future by a method other than the acquisition of Kennecott.

25. An alternative method of entry offers a substantial likelihood of ultimately producing deconcentration or other significant procompetitive effects in the United States molybdenum market.

X. EFFECTS OF THE PROPOSED ACQUISITION

26. The effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in the production of molybdenum in the United States market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) Actual competition between Amax and Kennecott may be substantially lessened;

(b) The likelihood of eventual deconcentration of the highly concentrated molybdenum market may be substantially lessened;

(c) High barriers to entry into the United States molybdenum market may be substantially increased;

(d) The likelihood of interdependent behavior among firms in the United States molybdenum market may be substantially increased;

(e) Additional acquisitions and mergers in the industry may be encouraged; and

(f) Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the production and sale of molybdenum.

XI. VIOLATIONS CHARGED

27. The effect of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition staff proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, a statement that solely for purposes of this proceeding respondents will not contest any of the jurisdictional facts of the draft complaint, a further statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The British Petroleum Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of England, with its office and principal place of business at Britannic House, Moor Lane, London, England.

Respondent The Standard Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of Ohio, with its office and principal place of business at Midland Building, Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and, in light of respondents' agreement that they will not contest any of the jurisdictional facts of the draft complaint, has jurisdiction of the respondents, and the proceeding is in the public interest.

Order

For purposes of this Order, the following definitions shall apply:

(a) *Respondent* means The British Petroleum Company Limited, a corporation, and its subsidiaries (any company or other entity in which it holds more than 50% of the stock or voting securities or voting rights), successors and assigns.

(b) *Amax* means AMAX Inc., a corporation, and its subsidiaries (any company or other entity in which it holds more than 50% of the stock or voting securities or voting rights), successors and assigns.

(c) *Outstanding stock* means stock or securities which have been issued and have not been recalled or purchased by the issuer, and excludes treasury stock.

(d) *Person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association or organization, or government or agency or political subdivision thereof, or other business or legal entity, other than respondent.

(e) *Molybdenum* means the metallic element Mo.

(f) *Molybdenum company* means any person which in the most recent calendar year for which information is available produced more than 3% of the contained molybdenum produced in the United States in that year.

(g) *Joint venture* means a joint business undertaking by two or more persons, for the purpose of carrying out a particular objective or objectives, pursuant to an agreement which provides for joint contributions to capital, which may include tangible and intangible assets, and some sharing of profits or production in kind.

(h) *Effective date* means the day on which this Order becomes final.

I

It is ordered, That within thirty (30) months from the effective date of this Order respondent divest, absolutely and in good faith, all right, title or interest in or to any stock issued by Amax which

respondent directly or indirectly owns or controls as of the effective date of this Order.

II

It is further ordered, That until the divestiture required by Paragraph I of this Order is completed, respondent shall, at any meeting of the holders of common stock of Amax, cause any of the stock issued by Amax which respondent directly or indirectly owns or controls to be voted in respect of any matter in the same respective proportions as the votes cast by the other holders of common stock of Amax.

III

It is further ordered, That for ten (10) years commencing September 1, 1981 no person who is an officer, director or employee of any other molybdenum company shall be an officer, director or employee of respondent.

IV

It is further ordered, That for ten (10) years following the effective date of this Order respondent shall not, without the prior approval of the Commission, directly or indirectly, (a) acquire (except for investment purposes for the benefit of an employee pension fund) any part of the stock of a molybdenum company, or (b) acquire more than 50% of the assets of a molybdenum company. For purposes of the foregoing clause (b), assets shall be valued in accordance with generally accepted accounting principles.

V

It is further ordered, That for two years following the effective date of this Order respondent shall not, without the prior approval of the Commission, enter into any joint venture or similar arrangement with any other molybdenum company for the production or sale of molybdenum in the United States; and that for an additional three-year period following this two-year period, respondent shall notify the Commission ninety (90) days in advance of entering into any joint venture or similar arrangement with any other molybdenum company for the production or sale of molybdenum in the United States.

VI

It is further ordered, That no acquisition, joint venture or other act or transaction to which respondent is a party shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this Order.

VII

It is further ordered, That within ninety (90) days from the effective date of this Order and on the anniversary of the effective date of this Order in every year thereafter, respondent shall submit to the Commission in writing a verified report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied therewith.

VIII

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any change in its corporate structure (such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation) which may affect compliance obligations arising out of this Order.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8918. Complaint, Feb. 23, 1973—Final Order, Sept. 9, 1981

This order requires, among other things, a New York City manufacturer of Anacin, Arthritis Pain Formula (APF), and other non-prescription drug products to cease misrepresenting that Anacin will relieve tension, nervousness and depression; or that it will enable users to cope with ordinary stresses of everyday life. Should the company make any comparative efficacy claims for Anacin or APF, it would be required to disclose that the analgesic ingredient in the product is aspirin. The order also prohibits misrepresentations concerning the extent or results of product testing; and bars any unsubstantiated performance claim unless accompanied by a conspicuous disclosure that such claim has not been proven. The company is further precluded from representing that its products contain any unusual or special ingredient, when, in fact, such ingredient is commonly used in similar products. Additionally, the order prohibits the C.T. Clyne Company, Inc., an advertising agency, from knowingly making unsubstantiated "superior performance" or "unusual ingredient" claims for Anacin, APF or for any other non-prescription internal analgesic product.

Appearances

For the Commission: *Melvin H. Orlans, James H. Skiles, W. Benjamin Fisherow, Ira Nerken, Judith A. Neibrief* and *Richard A. Bloomfield.*

For the respondents: *Samuel W. Murphy, Jr., John J. McGrath, Jr., Donald J. Frickel,* and *E. Thomas Sullivan, Donovan Leisure Newton & Irvine,* Washington, D.C., for American Home Products Corporation, and *Irving Scher* and *Deborah M. Lodge, Weil, Gotshal & Manges,* Washington, D.C., for The C.T. Clyne Company, Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Home Products Corporation, a corporation, (hereinafter referred to as "Amho"), and Clyne Maxon, Inc., a corporation, (hereinafter referred to as "Maxon"), hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest,

hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

1. *Commerce* means commerce as defined in the Federal Trade Commission Act.

2. *False advertisement* means false advertisement as defined in the Federal Trade Commission Act.

PAR. 2. Respondent American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 685 Third Ave. in the City of New York, State of New York.

Respondent Clyne Maxon, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 245 Park Ave. in the City of New York, State of New York. [2]

PAR. 3. Respondent Amho Corporation is now, and has been for more than one year last past, engaged in the manufacturing, advertising, offering for sale, sale and distribution of non-prescription internal analgesic preparations which fall within the classification of drugs, as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparations, the active ingredients thereof and directions for use are as follows:

1. *Designation:* "Anacin"

Active Ingredients (One Tablet):
Acetylsalicylic Acid
Caffeine Anhydrous

Dosage: One to two tablets with water. Repeat if necessary, one tablet every 3 hours. For children under 6 consult a doctor.

2. *Designation:* "Arthritis Pain Formula"

Active Ingredients (One Tablet):
Acetylsalicylic Acid (micro-fine)
Aluminum Hydroxide, Dried Gel
Magnesium Hydroxide, NF

367-444 O - 82 - 10 : QL 3

Dosage: Convenient daily schedule for adults is one or two tablets first thing in the morning; then repeat one or two tablets as needed at lunch, dinner and bedtime. Do not exceed 8 tablets in any 24 hour period. Not recommended for children.

PAR. 4. Respondent Maxon is now, and for some time last past has been, the advertising agency of respondent Amho, and now, and for some time last past, has prepared and placed for publication, and has caused the dissemination of, advertising material, including but not limited to the advertising referred to herein, to promote the sale of "Arthritis Pain Formula", which comes within the classification of "drug," as the term "drug" is defined in the Federal Trade Commission Act. [3]

In the course and conduct of its business, respondent American Home Products Corporation causes the said products, when sold to be shipped from its plant and facilities in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent American Home Products Corporation maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce.

PAR. 5. In the conduct of its business at all times mentioned herein, respondent Amho Corporation has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of non-prescription internal analgesic products.

In the conduct of its business at all times mentioned herein, respondent Clyne Maxon, Inc. has been in substantial competition, in commerce, with other corporations, firms, and individuals in the advertising business.

PAR. 6. In the course and conduct of their business, as aforesaid, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said products by the United States mail and by various means in commerce, including, but not limited to, advertisements inserted in magazines and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products, and has disseminated, and caused the

dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said drugs in commerce.

PAR. 7. Among and typical of the statements and representations contained in said advertisements as hereinabove mentioned are those relating to the product "Anacin" contained in two (2) television commercials' story-boards and one newspaper advertisement which have been reproduced, attached to this complaint, and made a part hereof,* and the following: [4]

A. For "Anacin"

1. Turns Off Headache Pain, So Relaxes Its Tension, Helps Lift Its Depression–Fast

In 22 seconds after entering your bloodstream this special fortified formula is speeding relief to your nervous headache. It promptly relieves the pain, so relaxes its tension and helps lift its depression. You can bounce back fast–able to carry on and do your work. This effective headache relief is Anacin (R)–a special fortified combination of ingredients and only Anacin has this formula. Anacin Analgesic Tablets contain the medication doctors recommend most for headache pain. In fact, Anacin gives you more of it than any leading headache tablet. Next time–try medically proven Anacin Tablets.

2. When Nervous Tension And Fatigue Bring On "Housewife Headache" . . .

The busy mother and homemaker has many repetitious tasks she must perform daily to make life pleasant for her family. And it's understandable how tensions and fatigue can build up during the day and result in what is now known as "housewife" headache. For this type of headache you need strong yet safe relief. So next time take Anacin (R). Anacin gives you 100% more of the strong pain-reliever doctors recommend most for headaches than the other leading extra-strength tablet. Minutes after taking Anacin, your headache goes, so does its nervous tension and fatigue, Anacin lets you feel better all over–able to carry on. Despite its strength, Anacin is safe taken as directed. It doesn't leave you depressed or groggy. Next time take Anacin Tablets! [5]

3. What's Best To Take For A Nervous Tension Headache?

Why not the strong pain-reliever doctors recommend most? You'll find it in Anacin (R). Anacin is a special fortified formula that turns off headache pain in minutes, so . . . relaxes its nervous tension and relaxes its painful pressure on nerves. Anacin lets you feel better all over.

4. Takes The "Pressure-Pain" Out Of Your Nervous Headache In Minutes.

. . . so relaxes its nervous tension, releases painful pressure on nerves . . . you feel great again.

* Exhibits not reproduced because of poor quality.

The pressures of today's hectic world often give people today's nervous tension. And nervous tension causes the most common headache of all. Tension presses on nerves and tiny blood vessels in your head, then brings on a "painful pressure" headache. You want the quick strength of Anacin (R) for relief.

Anacin is a special fortified formula that turns off headache pain in minutes, so relaxes its tension, releases painful pressure on nerves. Helps you feel great again. And the soothing effect continues for hours.

Anacin gives you 100% more of the specific pain-reliever doctors recommend most for headaches–than the other leading extra-strength tablet. Powerful Anacin helps relieve a painful pressure headache but doesn't dull your senses. Smooth, gentle acting too, next time take Anacin Tablets.

5. New Clinical Study Indicates Anacin Treats Headaches As Effectively As The Most Widely Prescribed Pain-Relief Compound . . . yet has fewer side effects and is more economical.

6. Compared To The Other Extra-Strength Tablet: Gives You *Twice As Much* Of The Pain-Reliever Doctors Recommend Most For Headaches And twice as many people now use it! . . . Anacin gives real fast relief from tension headache pain, so its tension goes–you function better and do a better job. **[6]**

7. *Survey Of Doctors Of Internal Medicine Report:* Twice As Many Doctors Prefer This Extra-Strength Pain-Reliever For Headaches. And Another Medical Research Report Proves This Same Tablet Relieves Nervous Tension Headaches As Effectively As The Leading Prescription Pain-Reliever.

Replies from over 1600 doctors who specialize in internal medicine showed twice as many preferred the formula of extra-strength Anacin for headache pain over that of the other leading extra-strength tablet. These doctors certainly know their pain-relievers and this was verified by another medical report that proved Anacin gives the same powerful pain relief from headaches as the leading prescription. Yet Anacin needs no prescription. And costs far less. Extra-strength Anacin Tablets work fast. Headache goes in minutes so its nervous tension goes, too. Anacin lets you do a better job–lets you function better. Despite its strength Anacin is not narcotic. Not habit-forming. It makes good sense to take fast acting, extra-strength Anacin (R)–the pain-reliever preferred by twice as many doctors.

8. The Most Exciting Headache News In Years!

Results of doctor's tests in treating tense, nervous headaches now made public.

If you are one of millions who get tense, nervous headaches–these latest tests by doctors should be of the utmost importance.

Whitehall Laboratories who make world-famous Anacin (R) Tablets have always known Anacin is a powerful, fast-acting pain reliever. Anacin is a special fortified combination of ingredients. Millions of sufferers must consider Anacin superior because it's America's largest selling analgesic.

Having the greatest confidence in the high quality of relief Anacin offers, the makers of Anacin decided to compare its effectiveness for headaches with that of the leading pain-relief prescription of doctors . . . **[7]**

The results showed Anacin is just as effective to give complete relief from nervous headaches as the expensive, leading pain-relief prescription. Tests verified beyond a

doubt that Anacin has the same pain-relief power for headaches as this prescription for which doctors wrote 21 million prescriptions last year . . .

An advantage of Anacin is that it is not a narcotic. Not habit forming. You can take Anacin without getting dizzy or an upset stomach . . . .

So next time you get a nervous headache–you owe it to yourself to take Anacin–proved in doctors' tests to be equally effective for headache relief as the most powerful, most widely prescribed pain reliever. Yet Anacin needs no prescription and is far more economical.

B. For "Arthritis Pain Formula"

1. Arthritis Sufferers:

Wake Up Tomorrow Morning Without All That Stiffness! New Pain Formula. 50% stronger than a regular aspirin. So you take it less often. Yet so gentle you can take it on an empty stomach . . . a new formula for arthritis minor pain that (1) is so strong you can take it less often and still wake up in the morning without all the pain's stiffness and (2) is so gentle you can take it on an empty stomach. This means you get both extra medication and extra protection; extra medication because each tablet contains 50% more pain reliever than regular or buffered aspirin tablets. Extra protection because each tablet contains two antacids and is micronized (which means the tablet particles are so fine the pain reliever is more readily absorbed). Called Arthritis Pain Formula, it was specially developed by the makers of Anacin (R) to give arthritis sufferers an easier, less upsetting way to wake up without all that early morning stiffness and enjoy hours of relief.

PAR. 8. Through the use of the said advertisements and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication: [8]

A. By respondent Amho for "Anacin"

1. That Anacin contains more pain-dulling ingredients per tablet than any other non-prescription internal analgesic product on the market.

2. That Anacin's analgesic ingredient is unusual, special, and stronger than aspirin (acetylsalicylic acid).

3. That Anacin contains more than twice as much of its analgesic ingredient as any other analgesic product on the market.

4. That within approximately 22 seconds after taking Anacin a person may expect relief from headache pain.

B. By respondents Amho and Maxon for "Arthritis Pain Formula"

1. That Arthritis Pain Formula's analgesic ingredient is unusual, special, and stronger than aspirin (acetylsalicylic acid).

2. That Arthritis Pain Formula will eliminate all pain, stiffness

and discomfort usually experienced by arthritis sufferers in the morning.

PAR. 9. In truth and in fact:

A. For "Anacin"

1. There are other analgesic products on the market which contain as much or more pain dulling ingredients per tablet than does Anacin.

2. Anacin's analgesic ingredient is ordinary aspirin (acetylsalicylic acid).

3. Anacin does not contain more than twice as much of its analgesic ingredient as all other analgesic products on the market. [9]

4. Relief from headache pain is not obtained within approximately 22 seconds after taking Anacin.

B. For "Arthritis Pain Formula"

1. Arthritis Pain Formula's analgesic ingredient is aspirin (acetylsalicylic acid).

2. Arthritis Pain Formula will not eliminate all pain, stiffness or discomfort usually experienced by arthritis sufferers in the morning.

PAR. 10. Further, through the use of the advertisements referred to in Paragraph Seven above and others similar thereto but not specifically set out herein, it has been represented and is being represented, directly and by implication:

A. By respondent Amho that it has been established that a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic.

B. By respondents Amho and Maxon that it has been established that Arthritis Pain Formula will cause gastric discomfort less frequently than any other non-prescription internal analgesic.

PAR. 11. In truth and in fact, neither of said representations referred to in Paragraph Ten has been established, for reasons including, but not limited to, the existence of a substantial question, recognized by experts qualified by scientific training and experience to evaluate the efficacy and safety of such drugs, as to the validity of such representations.

PAR. 12. Further, through the use of the advertisements referred to in Paragraph Seven above and others similar thereto but not

specifically set out herein, it has been represented and is being represented, directly and by implication:

A. By respondent Amho that a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic.

B. By respondents Amho and Maxon that Arthritis Pain Formula will cause gastric discomfort less frequently than any other non-prescription internal analgesic. **[10]**

PAR. 13. At the time respondents made the representations referred to in Paragraph Twelve above, there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug products, concerning the validity of such representations.

PAR. 14. Furthermore, respondents made the representations referred to in Paragraph Twelve above without disclosing the existence of a substantial question, as alleged in Paragraph Thirteen above, as to the validity of each representation. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus respondents have failed to disclose material facts.

PAR. 15. Further, through the use of the advertisements referred to in Paragraph Seven above, and others similar thereto but not specifically set out herein, respondent Amho did represent and is representing, directly and by implication, that a recommended dose of Anacin relieves nervousness, tension, stress, fatigue and depression and will enable persons to cope with the ordinary stresses of everyday life.

PAR. 16. In truth and in fact, there existed at the time of the representations referred to in Paragraph Fifteen above no reasonable basis for making said representations in that respondent had no competent and reliable scientific evidence to support such representations.

PAR. 17. Further, through the use of the advertisements referred to in Paragraph Seven above and others similar thereto but not specifically set out herein, respondent Amho has represented and is now representing, directly and by implication, that certain scientific tests or studies conducted by or on behalf of respondent Amho prove that Anacin is as effective for the treatment or relief of headache pain as the leading prescription analgesic product and more effective for the treatment or relief of such pain than any other non-prescription internal analgesic product.

PAR. 18. At the time respondent made the representations referred to in Paragraph Seventeen, there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug products, concerning the validity, significance or interpretation of such tests or studies as they related to such representations. [11]

PAR. 19. Furthermore, respondent made the representations referred to in Paragraph Seventeen above without disclosing the existence of a substantial question, as alleged in Paragraph Eighteen above, as to the validity of each representation. In light of the representations made, the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products. Thus respondent has failed to disclose material facts.

PAR. 20. Further, through the use of the advertisement referred to in Paragraph Seven, item (A)(7), above, and others similar thereto but not specifically set out herein, respondent Amho has represented and is now representing, directly and by implication, that:

1. Twice as many specialists in internal medicine prefer Anacin for the treatment or relief of headache pain to any other non-prescription internal analgesic product.

2. More physicians recommend Anacin for the treatment or relief of headache pain than any other non-prescription internal analgesic product.

3. Such recommendation or preference constitutes convincing proof that Anacin will treat or relieve headache pain more effectively than any other non-prescription internal analgesic product.

PAR. 21. In truth and in fact, neither the design of the survey cited by respondent Amho, nor the responses to said survey, provides a reasonable basis for the representations referred to in Paragraph Twenty above.

PAR. 22. Further, respondent Amho marketed and advertised Anacin, and respondents Amho and Maxon marketed and advertised Arthritis Pain Formula, without disclosing in the advertising for such products that such products contain aspirin and that Anacin contains caffeine.

PAR. 23. In truth and in fact, aspirin and caffeine are well-known, commonplace substances, widely available in many products. Moreover, the use of aspirin or caffeine may be injurious to health and may cause undesirable side effects. Thus, respondents have failed to disclose material facts which, if known to certain consum-

ers, would be likely to affect their consideration of whether or not to purchase such products. [12]

PAR. 24. The advertisements referred to in Paragraph Seven above as alleged in Paragraphs Nine, Eleven, Fourteen, Nineteen, and Twenty-Three constituted and now constitute false advertisements.

PAR. 25. The making of representations as alleged in Paragraphs Thirteen, Sixteen, Eighteen, and Twenty-One constituted and now constitutes unfair or deceptive acts or practices in commerce.

PAR. 26. The use by respondents of the aforesaid deceptive representations, and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' drugs by reason of said erroneous and mistaken belief.

PAR. 27. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the false advertisements as aforesaid were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY

MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 1, 1978

PRELIMINARY STATEMENT

On February 23, 1973, the Federal Trade Commission ("Commission") issued a complaint charging American Home Products Corporation ("American Home") and Clyne Maxon, Inc. with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended (15 U.S.C. 45 and 52), [2]in connection with certain advertisements for Anacin and Arthritis Pain Formula ("APF"). Similar complaints were issued at the same time against Bristol-Myers Company (Docket No. 8917) and Sterling Drug Company (Docket No. 8919), in connection with certain advertisements for certain over-the-counter ("OTC") internal analgesic products marketed by these firms.

On May 29, 1973, respondents filed their respective answers to the Complaint, each denying that it had violated the Federal Trade

Commission Act. Administrative Law Judge William K. Jackson, originally assigned to this proceeding, entered a Prehearing Order, dated April 4, 1974, setting forth the issues of fact and law to govern the adjudicatory proceeding. This case was assigned to me upon Judge Jackson's retirement, effective January 1, 1975. By Order dated January 7, 1976, the Prehearing Order of April 4, 1974 was modified in certain respects.

The parties were allowed extensive pretrial discovery. Numerous prehearing conferences were held in order to simplify the issues, to resolve disputes related to discovery and generally to expedite the trial preparation of the parties.

Based on the complaint and answer and prehearing orders, the following issues are matters for determination in this proceeding:

(a) Whether the challenged advertisements represented that:

(i) Anacin contains more pain-dulling ingredients per tablet than any other non-prescription internal analgesic product on the market (Comp. ¶ 8(A)(1)).

(ii) Anacin's analgesic ingredient is unusual, special, and stronger than aspirin (acetylsalicylic acid) (Comp. ¶8(A)(2)).

(iii) Anacin contains more than twice as much of its analgesic ingredient as any other analgesic product on the market (Comp. ¶8(A)(3)).

(iv) Within approximately 22 seconds after taking Anacin a person may expect relief from headache pain (Comp. ¶ 8(A)(4)).

(v) Arthritis Pain Formula's analgesic ingredient is unusual, special, and stronger than aspirin (acetylsalicylic acid) (Comp. ¶8(B)(1)). [3]

(vi) Arthritis Pain Formula will eliminate all pain, stiffness and discomfort usually experienced by arthritis sufferers in the morning (Comp. ¶ 8(B)(2)).

(vii) A recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic (Comp. ¶ 12(A)).

(viii) Arthritis Pain Formula will cause gastric discomfort less frequently than any other non-prescription internal analgesic (Comp. ¶ 12(B)).

(ix) A recommended dose of Anacin relieves nervousness, tension, stress, fatigue and depression (Comp. ¶ 15).

(x) A recommended dose of Anacin will enable persons to cope with the ordinary stresses of everyday life (Comp. ¶ 15).

(xi) It has been established that a recommended dose of Anacin is

more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic (Comp. ¶ 10(A)).

(xii) It has been established that Arthritis Pain Formula will cause gastric discomfort less frequently than any other non-prescription internal analgesic (Comp. ¶ 10(B)).

(b) Whether the representations in paragraph (a) (xi) and (xii) above, if made, have been established (Comp. ¶ 11).

(c) Whether there existed at the time of the alleged representations set forth in paragraph (a) (vii) and (viii), a substantial question, recognized by qualified experts, as to the validity of said representations (Comp. ¶ 13).

(d) Whether there existed at the time of the alleged representations set forth in paragraph (a) (xi) and (xii), a substantial question, recognized by qualified experts, as to the validity of said representations (Comp. ¶ 11). **[4]**

(e) Whether the existence of a substantial question, if established, was a material fact of which the failure to disclose constituted an unfair or deceptive advertising practice (Comp. ¶ 14).

(f) Whether the alleged representations set forth in paragraph (a)(ix) and (x), if made, were based on a reasonable basis (Comp. ¶16).

(g) Whether American Home, through advertising, represented that certain scientific tests proved that Anacin is as effective for the treatment or relief of headache as the leading prescription analgesic product and is more effective for the treatment or relief of such pain than any other non-prescription internal analgesic product (Comp. ¶17).

(h) Whether there existed a substantial question, recognized by qualified experts, concerning the validity, significance or interpretation of the tests referred to in paragraph (g) as they relate to such representations (Comp. ¶ 18).

(i) Whether the existence of a substantial question, if established in relation to paragraph (h), was a material fact of which the failure to disclose constituted an unfair or deceptive advertising practice (Comp. ¶ 19).

(j) Whether the alleged advertisement referred to in paragraph 7, item (A)(7), of the Complaint represented that:

(i) Twice as many specialists in internal medicine prefer Anacin for the treatment or relief of headache pain to any other non-prescription internal analgesic product.

(ii) More physicians recommend Anacin for the treatment or relief of headache pain than any other non-prescription internal analgesic product.

(iii) Such recommendation or preference constitutes convincing proof that Anacin will treat or relieve headache pain more effectively [5]than any other non-prescription internal analgesic product (Comp. ¶ 20).

(k) Whether the design of, or responses to, the survey referred to in paragraph 7, item (A)(7) of the Complaint provided a reasonable basis for the alleged representations in paragraph (j) (Comp. ¶ 21).

(l) Whether American Home marketed and advertised Anacin without disclosing in such advertising that Anacin contained aspirin and caffeine (Comp. ¶ 22).

(m) Whether respondents marketed and advertised Arthritis Pain Formula without disclosing in such advertising that APF contained aspirin (Comp. ¶ 22).

(n) Whether the use of aspirin or caffeine in customary or recommended doses in the products involved in this case can be injurious to health and cause undesirable side effects.

(o) Whether a significant number of certain consumers do not know that Anacin contains aspirin and caffeine and that Arthritis Pain Formula contains aspirin.

(p) Whether the failure to disclose in advertisements that Anacin contains aspirin and caffeine would be likely to affect the consideration of purchasing such product by certain consumers in the light of other information about the ingredients of such product, such as the labeling and packaging for such product.

(q) Whether the failure to disclose in advertisements that Arthritis Pain Formula contains aspirin would be likely to affect the consideration of purchasing such product by certain consumers in light of other information about the ingredients of such product, such as the labeling and packaging for such product.

(r) Whether the presence of aspirin and caffeine in Anacin is a material fact in light of the challenged advertising or material with respect to the consequences which may result from the [6]use of said product under the conditions prescribed in said advertising or under such conditions as are customary or usual.

(s) Whether the presence of aspirin in Arthritis Pain Formula is a material fact in light of the challenged advertising or material with respect to the consequences which may result from the use of said product under the conditions prescribed in said advertising or under such conditions as are customary or usual.

(t) Whether the use by respondents of the representations referred to in paragraph 25 of the Complaint, and the advertisements referred to in paragraph 24 of the Complaint, has had and

now has the tendency and the capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true, and into the purchase of substantial quantities of Anacin and Arthritis Pain Formula by reason of said erroneous and mistaken belief (Comp. ¶ 26).

(u) Whether the alleged advertising representations, if made, have caused the purchase of substantial quantities of Anacin and Arthritis Pain Formula by reason of erroneous and mistaken belief.

(v) Whether the alleged advertising representations, if made, are sufficiently likely to have continuing injurious effects upon consumers and/or competitors, so as to warrant corrective advertising.

(w) Whether the representations involved in this proceeding were made by respondents in good faith compliance with the applicable legal standards in effect at the time the representations were made.

By Order dated February 16, 1977, a joint hearing was ordered with respect to certain common documents and witnesses for the presentation of complaint counsel's cases-in-chief in the three companion OTC internal analgesic cases (Docket Nos. 8917, 8918 and 8919). Joint evidentiary hearings commenced on June 6, 1977 and continued until August 15, 1977. The separate evidentiary hearings for the presentation of complaint counsel's case-in-chief in this case began on [7]November 1, 1977 and continued until December 19, 1977. My disposition of respondents' motion to dismiss the Complaint filed at the close of complaint counsel's case was deferred until completion of the defense hearings. Respondents commenced their defense on January 30, 1978 and continued until March 22, 1978. The evidentiary record was closed on April 13, 1978.[1] The parties filed simultaneously their proposed findings of fact, conclusions of law, order and supporting briefs and subsequent replies. An oral argument on the proposed findings was heard on July 7, 1978. Some 40 witnesses, including 27 expert witnesses, testified. Transcripts of hearings for the joint and separate hearings number some 11,600 pages. Some 400 documentary exhibits, including numerous copy tests, penetration and image studies, and medical-scientific studies were received in evidence.

The proposed findings and conclusions submitted by the parties and their arguments in support thereof have been given careful consideration by me and to the extent not adopted by this Initial Decision, in the form proposed or in substance, are rejected as not

[1] By orders dated May 3 and June 28, 1978, the Commission extended the due date of this Initial Decision to September 1, 1978.

supported by the evidence or as immaterial. Any motion appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this Initial Decision are hereby denied.

Upon consideration of the entire record in this proceeding and having considered the demeanor of the witnesses, I make the following findings of fact and conclusions of law and order based on the record considered as a whole: [1A] [8]

Findings of Fact

I. Introduction

A. *Identity of Respondents and the Nature of Their Business*

1. American Home Products Corporation is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its administrative headquarters located at 685 Third Ave., New York, New York. American Home is now and has been manufacturing, offering for sale, advertising, selling, and distributing non-prescription internal analgesic preparations designated "Anacin" and "Arthritis Pain Formula," which fall within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act (Ans. of American Home, ¶¶ 2 and 3).

2. In the course and conduct of its business, American Home causes Anacin and APF to be shipped from its plant and facilities in various States of the United States to purchasers located in various other States of the United States and the District of Columbia. It maintains a substantial course of trade in said products in commerce. In the conduct of its business, it has been in substantial

[1A] For the purposes of this Initial Decision, the following abbreviations were used:

F.	–	Finding of fact in this Decision.
CPF	–	Complaint Counsel's Proposed Findings.
CB	–	Complaint Counsel's Memorandum In Support of Proposed Findings.
CRB	–	Complaint Counsel's Memorandum In Support of Reply Findings.
RPF	–	American Home's Proposed Findings.
RB	–	American Home's Post-Trial Memorandum.
RRB	–	American Home's Post-Trial Reply Memorandum.
Tr.	–	Transcript of hearings, sometimes preceded by the name of the witness.
JTr.	–	Transcript of joint hearings, sometimes preceded by the name of the witness.
CX	–	Complaint counsel's documentary exhibit.
RX	–	American Home's documentary exhibit.
Comp.	–	Complaint.
Ans.	–	Answer.

competition in commerce with corporations, firms and individuals in the sale of non-prescription internal analgesic products (Ans. of American Home, ¶¶ 4 and 5).

3. Consumer sales for Anacin have been in excess of $52 million annually since 1965 and have increased in each successive year to approximately $41 million for the first half of 1977. Consumer sales for APF have been in excess of $1 million annually since 1969 and have increased in each successive year to approximately $7 million for the first half of 1977. Anacin's share of the non-prescription internal analgesic products market has been between approximately 14% and 17% from 1965 through the first half of 1977. APF's market share has been between 0.2% and 2.6% from 1969 through the first half of 1977 and has increased throughout this period (CX 611Z157–Z160; RX 240; RX 241; RX 243).

4. In the course and conduct of its business, American Home has disseminated, and caused the dissemination of, certain advertisements concerning Anacin and APF by the United States mail and by various means in commerce including, but not limited to, advertisements inserted in magazines and other advertising media, and television and radio broadcasts transmitted by television and radio stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing the purchase of said products (Ans. of American Home, ¶ 6). **[9]**

5. In promoting these products, American Home has spent more than $17 million annually on Anacin advertising since 1965 and approximately $16 million on such advertising in the first half of 1977. American Home has spent at least $500,000 annually on APF advertising since 1969 and approximately $3 million on such advertising in the first half of 1977 (Ans. of American Home, ¶ 7; CX 611Z140, Z157, Z160, Z170-Z174, Z176, Z177; RX 242, RX 243).

6. John F. Murray Advertising Agency ("Murray") is a wholly owned subsidiary of American Home. It has developed and disseminated the advertising for Anacin since February 1968 (CX 611Z146; DeMott, Tr. 4648–50).

7. Whitehall Laboratories ("Whitehall") is the division of American Home that markets Anacin and APF (CX 611Z146; DeMott, Tr. 4643). Whitehall shared in the development of advertising copy for APF; the approval of the president of Whitehall was necessary prior to the production of an APF advertisement (CX 611Z167).

8. The C.T. Clyne Company, Inc., the corporate successor to Clyne Dusenberry, Inc. and to Clyne Maxon, Inc. (hereinafter, collectively, "Clyne"), is a corporation organized, existing, and doing business under the laws of the State of New York, with its principal office and

place of business located at 1270 Avenue of the Americas, New York, New York (Ans. of Clyne, ¶ 2; CX 610, Stip. 1; CX 611Z165).

9. Since 1969, Clyne, an advertising agency, has been employed by American Home. In the course and conduct of its business, it has disseminated, and has caused the dissemination of, advertising to promote the sale of APF (Ans. of Clyne, ¶ 4; CX 610, Stip. 2, 3, 5; CX 611Z165; DeMott, Tr. 4649). Clyne participated with American Home in developing the challenged APF advertisements and, in conjunction with American Home and Murray, made certain arrangements for the dissemination of some of the challenged APF advertisements including, but not limited to, placing advertisements with advertising media for spot broadcasting (CX 610).

10. In the conduct of its business, Clyne has been in substantial competition in commerce with other corporations, firms and individuals in the advertising business (Ans. of Clyne, ¶ 5). **[10]**

B. *General Findings*

11. The active ingredients in one tablet of Anacin are 400 mg. (6.15 gr.) aspirin[2] and 32.5 mg. (0.35 gr.) caffeine. The active ingredients in one tablet of APF are 486 mg. (7.5 gr.) microfined aspirin, 20.14 mg. dried aluminum hydroxide gel and 60.42 mg. magnesium hydroxide (Ans. of American Home ¶ 3; RX 244Z003; Forrest, Tr. 464; Plotz, Tr. 1053; Sliwinski, Tr. 1136).

12. The active ingredients, directions for use and indicated uses of Anacin and APF appear on the labels and packages of these products (Comp. ¶ 3; Ans. of American Home, ¶ 3). The directions for use of each product, as reflected by the recommended dosage, are as follows:

(a) *Anacin:*

One to two tablets with water. Repeat if necessary, one tablet every 3 hours. For children under 6, consult a physician.

(b) *Arthritis Pain Formula:*

Convenient daily schedule for adults is one or two tablets first thing in the morning; then repeat one or two tablets as needed at lunch, dinner and bedtime. Do not exceed 8 tablets in any 24 hour period. Not recommended for children.

The indicated uses of each product are as follows:

[2] Aspirin is the commonly adopted name for acetylsalicylic acid ("ASA"), a member of the group of analgesic agents known as salicylates (CX 367E, Z011).

(a) *Anacin:*

relieves pain of headache, neuralgia, neuritis, muscular aches, discomforts and fever of colds, pain caused by tooth extraction, distress associated with normal menstrual periods. Also relieves minor aches and pains of arthritis and rheumatism.

(b) *Arthritis Pain Formula:*

relief from the minor aches and pains of arthritis and rheumatism and low-back pain. Also relieves the pain of [11]headache, neuralgia, neuritis—the discomforts and fever of colds, pain caused by tooth extractions, distress associated with normal menstrual periods.

13. The standard dosage unit for marketed products containing aspirin alone is generally 325 mg. (5 gr.) aspirin per tablet (Forrest, Tr. 467; Moertel, Tr. 958–59; CX 367M).

14. Aspirin, either as a single ingredient or in combination with other ingredients, is the most widely used analgesic drug in the United States; in fact, almost 19 billion dosage units are sold annually (Complaint Counsel's Admission, RX 244Z002; CX 367Z012). Aspirin is generally recognized as a safe and effective analgesic (Forrest, Tr. 502–03; Moertel, Tr. 998–99; Lasagna, Tr. 4096–97; CX 367Z012). Dried aluminum hydroxide gel and magnesium hydroxide, at certain dosage levels, are generally recognized as safe and effective antacid active ingredients (Complaint Counsel's Admission, RX 244Z006-Z007).

15. The complaint does not allege that American Home did not have a reasonable basis for making an advertising claim that a recommended dose of Anacin is more effective than a recommended dose of regular aspirin, nor does it allege that respondents did not have a reasonable basis for making an advertising claim that Arthritis Pain Formula causes gastric discomfort less frequently than regular aspirin (Complaint Counsel's Admission, RX 244Z026–Z027).

II. Expert Witnesses Who Testified Regarding Marketing and Medical Issues

A. *Marketing Witnesses*

16. On the issues related to advertising claims, product images and remedy, complaint counsel called Drs. Leavitt, Ross and Rossi; American Home called Drs. Blattberg, Jacoby, Kuehn, Maisel, Sen and Smith.

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17. Dr. Robert C. Blattberg, Professor of Marketing at the University of Chicago School of Business, has done extensive research and writing in the areas of mathematical and econometric modeling, advertising effects and advertising carryover effects, consumer purchase decisions, and the use of consumer diary panel data, as well as survey data, in analyzing consumer behavior. In addition to numerous consulting assignments relating to the marketing of consumer [12]goods and a continuing consulting arrangement with the research department of Leo Burnett & Co., Dr. Blattberg serves on the editorial boards of several distinguished journals of marketing and marketing research. He is currently one of the primary consultants to a research program being funded by the Advertising Research Foundation to collect and analyze empirical data on the effects of advertising (Blattberg, Tr. 6812–27; RX 2 (Rev.)).

18. Dr. Jacob Jacoby is a Professor in the Psychological Sciences Department at Purdue University, where he heads the Consumer Psychology Program which is widely known for its innovative and extensive work regarding the application of the science of psychology to the study of consumer behavior. In addition to his teaching, Dr. Jacoby has done extensive empirical research and has published numerous articles dealing with consumer decisionmaking and behavior and the effects of various factors, including advertising, upon consumers (Jacoby, Tr. 5189–97; RX 4 (Rev.)).

19. Dr. Alfred Kuehn was formerly a Professor of Marketing at the Carnegie-Mellon University School of Industrial Administration. After doing some of the initial work on the econometric modeling of consumer purchasing patterns and the determination of the "carryover" or "lag" effects of advertising, Dr. Kuehn established Management Science Associates, Inc. ("MSA"). MSA specializes in the analysis of all types of marketing data. In the course of the ongoing work performed at MSA, Dr. Kuehn has been constantly involved in measuring consumer attitudes towards various products and in empirically determining the carryover effects of advertising (Kuehn, Tr. 6225–43; RX 5).

20. Dr. Richard Maisel, Associate Professor of Statistics in the Graduate Department of Sociology at New York University, specializes in the statistical analysis of consumer survey data, sample design and survey methodology. In addition to his teaching, Dr. Maisel serves as a consultant to a number of large industrial concerns and market research organizations for the purpose of analyzing the meaning and statistical significance of surveys (Maisel, Tr. 4766-75; RX 10).

21. Dr. Clark Leavitt is a Professor of Marketing at the Ohio State University, concentrating in various subdisciplines of Psychology including social psychology, consumer behavior and research methodology (Leavitt, Tr. 1247, 1255). He supervises graduate and post-graduate student research and conducts research for publication in professional journals (CX 507). He has had extensive training and experience in the implementation, design and analysis of research which measures consumers' images and beliefs about products and the effects of advertising (Tr. at 1245–63; CX 507). As a consultant for clients **[13]**which include advertising agencies, he also designs and conducts applied research (Leavitt, Tr. 1255–56). Many of his projects have involved the development of rating scales to measure consumer perceptions or pre-dispositions (Leavitt, Tr. 1248–56). Dr. Leavitt's research has often involved the measurement of the relationship between the repetition of advertising and the stability of people's opinions or attitudes. Over half of the articles he has published in professional journals have involved research measuring attitudes, beliefs or images. Dr. Leavitt is a former President of the Division of Consumer Psychology of the American Psychological Association (Leavitt, Tr. 1260–61; CX 507).

22. Dr. Ivan Ross is a Professor of Marketing at the University of Minnesota, College of Business Administration, and is a licensed consulting psychologist. Dr. Ross has had extensive training and experience in the fields of consumer psychology and behavior, marketing and marketing research (CX 502; Ross, Tr. 1797–1829, 1833-38, 2404–07). This has included evaluating advertising and the effects of advertising over time on consumers and upon their attitudes and beliefs. It has also included conducting and interpreting research in these areas. In addition to his academic training (Ross, Tr. 1797) and academic work (Ross, Tr. 1797, 1799–1800, 1811–12), Dr. Ross has had experience working with advertisers and advertising agencies on advertising content and strategy for a variety of consumer goods and services and with various consumer research techniques such as focus groups, copy tests, penetration studies and image studies (Ross, Tr. 1800–11, 1824–29, 1833–35). Dr. Ross has also been a consultant with the Food and Drug Administration's ("FDA") Bureau of Foods, involved in recommending, conducting, and evaluating consumer research designed to improve labeling information on prescription and OTC drugs by improving FDA's understanding of consumption practices for health care and drugs. As part of this research effort, Dr. Ross has interviewed consumers regarding their understandings of the concept of "effectiveness" of drugs (Ross, Tr. 1806, 2404–07). He has also served as an editor and

reviewer of articles and papers on consumer behavior and advertising research for journal publication and presentation before various professional organizations (Ross, Tr. 1815). Additionally, Dr. Ross has presented papers before professional organizations in the areas of his expertise; his articles, studies, and other writings have been published in journals subject to peer review and other publications (Ross, Tr. 1816–19; CX 502). [14]

23. Dr. Peter Rossi, Professor of Sociology at the University of Massachusetts and Director of the Social and Demographic Research Institute at the University, has specialized in the design, conduct and analysis of sample surveys on matters of public interest throughout his career. His various academic and research positions have involved the supervision of researchers in the design and implementation of research (Rossi, Tr. 1557–59, 1565). Dr. Rossi is or has been an editor of various scholarly journals and monographs in his field of expertise (Rossi, Tr. 9560–61). He has published books and articles which are predominantly based on data gathered in sample surveys (Rossi, Tr. 1561–63A). Dr. Rossi has been consultant to marketing research organizations and has received grants to conduct research from the Ford, Carnegie and Russell Sage Foundations. He has received awards in the field of social science research and has been elected a Fellow in the American Association for the Advancement of Science (Rossi, Tr. 1568, 1561A; CX 503).

24. Dr. Subrata K. Sen is an Associate Professor of Marketing at the University of Rochester Business School. His primary research and teaching interests include marketing research and marketing models, the effects of advertising, product policy and behavior with particular emphasis on consumers' brand choice processes. Dr. Sen has done extensive research and writing concerning the analysis of panel data for the purposes of studying consumer behavior and has done substantial work on the question of the interrelationship of images, attitudes and consumer behavior. He has served as an editor or reviewer for most of the learned journals dealing with consumer research and consumer behavior (Sen, Tr. 7148–57; RX 16).

25. Dr. Joseph Smith has had extensive training and experience in the fields of marketing, experimental and consumer psychology with particular emphasis on the learning process, interpreting advertising and the duration of advertising's impact on consumer behavior (Smith, Tr. 5502–07, 5515–17; RX 17 (Rev.)). In 1956, Dr. Smith and another psychologist founded Oxtoby-Smith, Inc., a consumer research and consulting firm. The company is staffed by approximately 20 professional psychologists and marketing researchers with about 40 support personnel. Oxtoby-Smith, Inc.

conducts nearly 200 surveys a year; about one-half of these are related directly to advertising (Smith, Tr. 5497–5501, 5523). In a substantial number of these studies, Dr. Smith is actively engaged in the design of the study and/or the analysis of the data obtained (Smith, Tr. 5523–25). In a [15]consulting capacity, he is often called on to render expert opinion in lieu of a consumer survey, particularly in the area of consumer reactions to advertisements (Smith, Tr. 5500). Dr. Smith and his organization have conducted two substantial studies of consumer views and attitudes concerning the analgesics market, the first in 1967 and the second in 1970 (Smith, Tr. 5502; CX 451 and CX 452; RX 17(Rev.)).

B. *Medical Witnesses*

26. On the issues related to medical and scientific substantiation of the claims made in the advertisements and the medical aspects of the need for ingredient disclosure, complaint counsel called Drs. Azarnoff, DeKornfeld, Farr, Forrest, Grossman, Moertel, Plotz, Rickels, Sliwinski and Stevenson; American Home called Drs. Falliers, Kantor, Lasagna, McMahon, Okun and Shapiro, and Mr. Wallenstein.

27. Dr. Daniel L. Azarnoff, Distinguished Professor of Medicine and Pharmacology at Kansas University Medical Center and Director of the University's Clinical Pharmacology-Toxicology Center, is an eminent clinical pharmacologist with recognized expertise in the clinical testing and use of drugs, including analgesics (Azarnoff, Tr. 577, 593, 597, 598–99; CX 519A). He has received a number of honorary awards for his outstanding work in medicine and pharmacology including election as a Markle Scholar in Academic Medicine, election as a Burroughs Wellcome Scholar in Academic Medicine, election as a Burroughs Wellcome Scholar in Clinical Pharmacology and designation as a Fullbright Scholar (Azarnoff, Tr. 585–86; CX 519B). He has served as a consultant to the FDA as a member of the Endocrine Metabolism Advisory Committee. In this capacity, he reviewed foreign therapeutic trials of various drugs with regard to the evaluation of the safety of these drugs. He has also served as a consultant to the World Health Organization for the evaluation of drugs in human beings, and is currently serving as Secretary of the Clinical Pharmacology Section of the International Union of Pharmacologists (Azarnoff, Tr. 584–85, 587–91; CX 519C). In addition to extensive teaching commitments, he has also been involved in research activities and clinical hospital service. His research has involved him in approximately 150 studies, 10 to 15 of which focused on the therapeutic effects of various drugs on human beings

(Azarnoff, Tr. 578–79, 582, 594). Dr. Azarnoff's clinical research has given him a considerable background in the measurement of patients' subjective responses. In each of the 10 to 15 therapeutical [16]studies in which he has participated, he has been involved in all phases of the study, ranging from the initial development of the protocol through the implementation of the study, and then on through the analysis of the data (Azarnoff, Tr. 581–82). Dr. Azarnoff is also an editor of or advisor to several noted journals (Azarnoff, Tr. 589–90; CX 519C).

28. Dr. Thomas J. DeKornfeld, Professor of Anesthesiology at the University of Michigan Medical School, is one of the foremost authorities on analgesic testing. His involvement in the clinical testing of analgesics dates back to the late 1950's, when he began working with Dr. Louis Lasagna (DeKornfeld, Tr. 2762–63). Since that time, he has conducted between 30 and 40 clinical studies on a variety of drugs; the majority of these studies were conducted with analgesics, both OTC and prescription products (DeKornfeld, Tr. 2765–66; CX 512E). In his clinical practice, Dr. DeKornfeld has dealt extensively with the use of analgesics on patients experiencing pain (DeKornfeld, Tr. 2772–73). Dr. DeKornfeld has also held positions which have required him to exercise considerable responsibility in evaluating the designs and methodologies of clinical tests performed by other researchers. For example, he was the Director of Therapeutic Research for Parke, Davis and Company, a major pharmaceutical corporation, where he was charged with supervising all of the company's clinical research activities which were performed in the United States and Canada (DeKornfeld, Tr. 2763–65, 2769; CX 512A). Dr. DeKornfeld has been serving as Secretary to the University of Michigan Medical School's Committee to Review Grants for Clinical Research and Investigation Involving Human Beings for the last 12 years. Along with other committee members, he evaluates the design and safety of approximately 600 annual grant proposals for experiments dealing with human subjects that are to be conducted under the auspices of the University's Medical School (DeKornfeld, Tr. 2768–69; CX 512C). He is also a member of the Consulting Board to the United States Veterans Administration Cooperative Analgesic Study (DeKornfeld, Tr. 2768). Dr. DeKornfeld has published many articles in respected medical journals involving analgesics and analgesic testing (CX 512D-H).

29. Dr. Constantine J. Falliers is an expert in the field of allergies, including the relationship between aspirin and asthma. After practicing medicine for two years following his residencies, Dr. Falliers received a two-year fellowship in pediatric allergy and

clinical research at Jewish National Home for Asthmatic Children and Children's Asthma Research Institute & Hospital (CARIH) [17] in Denver, Colorado. He was appointed Director of Clinical Services at CARIH in 1959, Medical Director in 1963 and Chief of the Clinical Research Division in 1969. Dr. Falliers has served on the faculty of the University of Colorado Medical Center since 1961. He serves also as an Attending Allergist at Children's Hospital, St. Joseph Hospital and Research Center in Denver. He is board certified as a Diplomate of the American Board of Pediatrics with subspecialty certification in Pediatric Allergy. In addition to publishing nearly 100 articles and books, Dr. Falliers has received numerous research grants from the United States Public Health Service and private foundations. He has served also as the Chairman of the Psychosomatic Section and of the Rehabilitation Therapy Committee, Research Council of the American College of Allergists. In 1970, he served as Consultant to the Bronchiopulmonary Section of the Integrated Research Program on Chronobiology, International Biological Program of the United States Public Health Service. Dr. Falliers has served as a member of the editorial board of the *Annals of Allergy*. In addition to his present teaching duties at the University of Colorado Medical Center, Dr. Falliers is director of an allergy and asthma clinic in Denver (Falliers, Tr. 3169–87; RX 19).

30. Dr. Richard S. Farr, Chairman of the Department of Medicine of the National Jewish Hospital in Denver, is a recognized teacher and researcher in immunology. He has had extensive training and experience in the diagnosis, management and clinical testing of bronchial asthma and allergy, including the asthma and allergic effects attributable to aspirin. He previously headed the allergy/immunology sections at the University of Pittsburgh and the Scripps Clinic in La Jolla, California, and is also known for the development of the so-called Farr test which is still widely used in immunology research. Dr. Farr has been deeply involved in the clinical study of aspirin side effects since 1969 and is responsible for the development of the aspirin challenge procedure originating at National Jewish Hospital. His publications in this area have appeared in respected journals. Dr. Farr has served as the president of the American Academy of Allergy and has been connected with other professional associations that complement his work in asthma and allergy. Dr. Farr is also a Distinguished Service Professor of the University of Chicago and the recipient of the Borden Award for his outstanding work in the area of immunology (Farr, Tr. 2541–62).

31. Dr. William H. Forrest is an Associate Professor of Anesthesiology at Stanford University. He is a recognized expert in the field of

analgesic testing who has had extensive [18]experience evaluating analgesics; indeed, he has spent half of his time supervising, performing or evaluating clinical research on analgesics (Forrest, Tr. 408). Dr. Forrest has spent much time working with and developing subjective response methodologies. His introduction to clinical research came while he was a research fellow at Stanford in 1962. During that year, he worked under Dr. J.W. Belville, a respected researcher in the field of analgesic evaluations and Chairman of the FDA Advisory Review Panel on OTC Internal Analgesic and Antirheumatic Products ("FDA OTC Internal Analgesics Panel"). Dr. Forrest later became Chairman of the Veteran's Administration Cooperative Analgesic Study. In the Cooperative Study, individual analgesics were evaluated through use of a subjective response methodology in five to seven Veterans Administration hospitals located throughout the country. The results of the Cooperative Study demonstrated that carefully trained and supervised nurses and researchers could perform the same work in several different settings and obtain sound data relating to the efficacy and relative potency of a variety of intramuscular and orally administered analgesics. The Cooperative Study spanned a 14–year period and involved over 100 clinical analgesic studies (Forrest, Tr. 419–23; CX 510A-B). During the last 14 years, Dr. Forrest has been actively involved in various capacities with the National Research Council of the National Academy of Sciences ("NAS/NRC"). He was involved in the 1960's in the planning phases of the National Halothane Study which was sponsored by the Council; he has acted as a consultant to the Council on anesthesia; and he has been invited to attend annual meetings sponsored by the Council for researchers working in the field of analgesics. At these meetings, Dr. Forrest has presented numerous papers on his own work (Forrest, Tr. 417, 434–35; CX 510B). In addition, he has published over 60 articles dealing with analgesics, clinical testing and the subjective response methodology (CX 510D-I).

32. Dr. Morton Grossman, Chief of the Gastroenterology Section of the Veterans Administration Wadsworth Hospital in Los Angeles, is recognized as a preeminent researcher and practitioner of gastroenterology. Dr. Grossman, who currently directs the Center for Ulcer Research and Education in Los Angeles, is one of only six people in the country to hold the title of Senior Medical Investigator in the Veterans Administration. He is also a professor of medicine and physiology at the University of California at Los Angeles, has taught at major medical schools throughout the country and has served as a member of or advisor to many distinguished professional

groups, including the National Academy of Science, National Research Panel on Gastrointestinal Drugs, the FDA's OTC Panel on Antacids and the Gastrointestinal Drug Advisory [19]Committee of the FDA. Dr. Grossman's experience includes years of clinical practice with patients suffering gastrointestinal diseases, as well as considerable research in the areas of physiology and gastroenterology. He has done research on the mechanism and effects of aspirin ingestion on the gastrointestinal tract and has published many articles on this topic which appear in the literature. He has also served on various editorial boards of scientific journals and currently chairs the editorial board of *Gastroenterology*, the official journal of the American Gastroenterological Association. Dr. Grossman has published over 345 articles and has contributed to scores of text books and other resource works on gastroenterology. Dr. Grossman has been the recipient of major awards and honors in his field, including the Freeden-Wald medal of the American Gastroenterological Association, which is its highest award. He has also held high offices with many of the professional societies concerned with problems of gastroenterology (Grossman, Tr. 814–23; CX 516).

33. Dr. Thomas Kantor, a clinical pharmacologist and rheumatologist at New York University, has conducted approximately 75 clinical investigations on drugs, many of which involved the testing of graded doses of aspirin. Following his medical school and post-medical school training, he became board certified in 1955 as a Diplomate of the American Board of Internal Medicine. In 1960, Dr. Kantor was appointed Assistant Professor of Medicine and Chairman of the Section of Clinical Pharmacology of the Department of Medicine at New York University. He was appointed Professor of Clinical Medicine in 1972 and is currently the Chairman of the Clinical Pharmacology Section of New York University's School of Medicine. Dr. Kantor also serves as attending physician at Bellevue Hospital, Veterans Administration Hospital, University Hospital and Goldwater Memorial Hospital, all in New York City. In addition to his teaching, clinical research and practice, Dr. Kantor has published extensively on many aspects of the evaluation of drugs and analgesic testing. He served as a member of the NAS/NRC Analgesic Drug Efficacy Panel, which was chaired by Dr. Louis Lasagna. From 1971 to 1972, he served as consultant to the Bureau of Drugs of the FDA, and from 1971 to 1974 served as Chairman of the Section of Rheumatology of the American Society for Clinical Pharmacology and Therapeutics. In 1973, Dr. Kantor was appointed Chairman of the FDA's OTC Topical Analgesic Drug Review Panel, a position he still holds (Kantor, Tr. 3534–54; RX 23). [20]

34. Dr. Louis Lasagna, Chairman of the Department and Professor of Pharmacology and Toxicology and Medicine at the University of Rochester School of Medicine, is a leading authority on analgesia and the testing of analgesic drugs. Following his medical school and post-medical school training, Dr. Lasagna took a post-doctoral fellowship in 1950 in the Department of Pharmacology and Experimental Therapeutics at the School of Medicine at Johns Hopkins University. He retained an academic appointment there until 1970, except for a teaching and research position at Massachusetts General Hospital, Boston University and Harvard University, where he studied under and worked with the late Dr. Henry Beecher, pioneering researcher and preeminent analgesic authority. During the time that Drs. Lasagna and Beecher worked together, they were engaged in developing the methodology for evaluating subjective responses to drugs, and they conducted evaluations of numerous analgesic drugs, including aspirin. The results of their research led to the development of a methodology for performing clinical evaluations and comparisons of drugs which is characterized by subjective responses. This research resulted in the publication of a number of joint and individual works by Dr. Lasagna and Dr. Beecher on the subject of the testing and evaluation of analgesic drugs. For 16 years, Dr. Lasagna served as Director of the Division of Clinical Pharmacology at Johns Hopkins Medical School. In 1970, Dr. Lasagna was appointed Professor of Medicine, Pharmacology and Toxicology and Chairman of the Department at the University of Rochester School of Medicine, where he teaches courses in therapeutics and pharmacology. In addition to approximately 300 published articles, Dr. Lasagna has had an extensive career in testing and evaluating drugs and is considered by his peers as one of the foremost clinical pharmacologists in the evaluation of analgesic drugs. He has served as a consultant to the National Cancer Institute, National Institute of Mental Health, American Rheumatism Association, National Institute of General Medical Sciences, National Heart Institute and American Society for Clinical Pharmacology and Therapeutics. He has also served on the editorial board of several respected journals. He received the Modern Medicine Award of 1972 for his contribution to the evaluation of drugs; the Oscar B. Hunter Award given by the American Society for Pharmacology and Experimental Therapeutics for his significant contribution to therapeutics; and the American Society for Pharmacology and Experimental Therapeutics Award for his contributions to experimental therapeutics. Dr. Lasagna was selected as Chairman of the NAS/NRC Analgesic Drug Efficacy Study which was sponsored by

and under contract with the FDA. The NAS/NRC Panel reviewed prescription and some OTC analgesics marketed between 1938 and 1962 to determine their efficacy [21]and safety. In 1962, he was commissioned by the Federal Trade Commission to perform a controlled clinical study comparing the effectiveness of five leading OTC analgesics (Lasagna, Tr. 4020–43; RX 6; Forrest, Tr. 506–08; Azarnoff, Tr. 635–37; Lewis, Tr. 782).

35. Dr. Gilbert McMahon, Professor of Medicine and Chairman of the Therapeutics Section of the Department of Medicine at Tulane University School of Medicine, presently serves as President-elect of the American Society of Clinical Pharmacology and Therapeutics and Vice-President of the International Society of Clinical Pharmacology. He is an expert in the field of pharmacology. In 1968, he was appointed Chairman of the Therapeutics Section, Department of Medicine at Tulane University and also Senior Visiting Physician at Charity Hospital in New Orleans. In addition to his academic appointments, Dr. McMahon has held various other positions such as Director of Clinical Research for the Upjohn Company from 1960–1964, Vice-President in charge of Medical Research for the Ciba Pharmaceutical Company from 1964–1967 and Executive Director in charge of Clinical Research for Merck, Sharp and Dohme from 1967–1968. In addition to his extensive teaching and research work, he has served as either an editor or manuscript reviewer for the New England Journal of Medicine, American Journal of Medicine, American Heart Journal, Journal of Clinical Investigation and the Journal of Laboratory and Clinical Medicine. Dr. McMahon is also Chairman of the Drug Regulatory Committee of the American Society for Clinical Pharmacology and Therapeutics, Chairman of the Pharmacy and Therapeutics Committee of Tulane University Hospital and Clinic, and Chairman of Charity Hospital's Human Research Committee. Among over 100 articles or books written by Dr. McMahon is the 15–volume treatise, *Principles and Techniques of Human Research and Therapeutics*, for which he served as senior editor (McMahon, Tr. 3668–99; RX 11).

36. Dr. Charles G. Moertel is Director of the Mayo Clinic's Comprehensive Cancer Center, Chairman of its Department of Oncology and Professor of Medicine at the Mayo Medical School. He is an expert in the clinical testing of drugs and in evaluating patients' subjective responses to analgesics (Moertel, Tr. 914; CX 511A). At the Mayo Clinic, Dr. Moertel is involved in the evaluation of therapeutic agents with respect to all of the Clinic's treatment programs designed to deal with malignant diseases starting in the gastrointestinal tract. He has extensive experience in the evaluation

of the symptomatic and supportive care of the cancer patient; this work encompasses the evaluation of analgesic, anti-emetic and diuretic agents [22](Moertel, Tr. 923–25). Since a predominant part of Dr. Moertel's practice was to treat advanced cancer patients, who could no longer be helped by surgery but who suffered from mild to severe pain, Dr. Moertel developed an interest in the comparative efficacies of the available analgesics. He conducted two studies involving numerous OTC and prescription oral analgesics to determine their comparative efficacies in relieving pain. Both of these studies were published in leading medical journals and subjected to peer review (Moertel, Tr. 925–27; CX 511J, N). Dr. Moertel has also evaluated some of the newer agents developed by pharmaceutical companies for analgesic purposes (Moertel, Tr. 927–28). He has conducted a number of clinical studies using anti-emetic and chemotherapeutic drugs (Moertel, Tr. 929–32). In all of these studies, Dr. Moertel has been involved in the analysis and evaluation of patients' subjective responses (Moertel, Tr. 932–33). In addition to contributing articles focusing on specific research studies, Dr. Moertel has also submitted articles for publication dealing with analgesics in the broader context as well as touching on his overall clinical experience in the management of cancer pain. These articles have appeared in several textbooks of which he has been either the primary author or a contributor (Moertel, Tr. 933). Dr. Moertel is a member of the Editorial Board of the *Journal on Cancer*, and an Associate Editor of *Cancer Medicine*, a standard textbook in medical oncology (Moertel, Tr. 918–19). As a practicing physician, Dr. Moertel prescribes, administers and advises patients on a daily basis in the usage of analgesics. In his clinical practice, he has had occasion to prescribe aspirin (Moertel, Tr. 934–35). Dr. Moertel was invited by the FDA to join its Oncologic Drugs Advisory Committee. As a member of this Committee, he advises the FDA on the conducting of clinical protocols of new drugs contemplated for use in the treatment of cancer patients. His broad expertise in the area of clinical testing was further recognized when he was invited to serve as a member of the Phase One Study Group of the National Cancer Institute. In this capacity, he helps to evaluate the types of protocols that will be most appropriate to determine the clinical value of new agents for the treatment of malignant diseases (Moertel, Tr. 918–23; CX 511).

37. Dr. Ronald Okun is Associate Professor of Medicine and Medical Pharmacology and Therapeutics at the University of California (Irvine) School of Medicine and Director of Clinical Pharmacology at Cedars-Sinai Medical Center in Los Angeles,

California. He is an expert in the field of clinical pharmacology. He was the recipient of a post-doctoral fellowship in clinical pharmacology at Johns [23]Hopkins University where he studied, and worked with Dr. Louis Lasagna in the clinical testing of various drugs. Prior to assuming his current academic appointment, Dr. Okun served on the medical school faculty of the University of California in Los Angeles from 1963 to 1970. Dr. Okun has served since 1969 as the Scientific Advisor to the Board of Directors at the Cedars-Sinai Medical Center. In addition to extensive experience conducting clinical investigations on drugs, approximately 75 to 100 in number with about 25 involving aspirin, he has also served in a consulting role in the design of over 100 clinical investigations. Many of his research projects from 1963 to 1976 were done in collaboration with Dr. Henry Elliot, the Chairman of the FDA OTC Internal Analgesics Panel until the time of his death. Dr. Okun served from 1973 to 1975 as President of the American Academy of Clinical Toxicology, and in 1973 was appointed co-director of the National Cooperative Gallstone Study which received the largest grant ever awarded by the Digestive Diseases Section of the National Institutes of Health. Throughout his professional career, he has published widely in the field of pharmacology and has served as an Editor of the Annual Review of Pharmacology (Okun, Tr. 4279–4301; RX 13).

38. Dr. Paul H. Plotz is a senior investigator of the Arthritis and Rheumatism Branch of the Institute of Arthritis, Metabolism and Digestive Diseases of the National Institutes of Health ("NIH"). He is a member of the Arthritis Advisory Committee of the FDA and head of the Subcommittee on the Study of Long Acting Drugs. Dr. Plotz has lectured, consulted and written on topics related to rheumatologic diseases. He has done extensive research on the basic mechanisms of rheumatologic diseases, much of which has involved the study of aspirin and aspirin-containing drugs. Several of these studies have been published. Dr. Plotz also has experience in the clinical testing of drugs in humans and has long been active in the review of clinical tests conducted by others. He maintains a clinical practice involving many referral patients at NIH and has acted as attending physician at two local Washington, D.C. hospitals. The majority of Dr. Plotz's patients suffer from rheumatologic diseases and are treated primarily with aspirin and aspirin-containing products. Dr. Plotz is a member of various scientific and medical associations that complement his expertise in rheumatologic diseases and their treatment (Plotz, Tr. 1034–43; CX 523).

39. Dr. Karl Rickels, Professor of Psychiatry and Pharmacology at the University of Pennsylvania, is an eminent practitioner with

extensive training and experience [24]in the diagnosis and management of patients exhibiting non-psychotic symptoms such as anxiety and tension. He directs the Private Practice Research Group, funded by NIH, which is the only unit in the country conducting research on a large scale with private patients, referred by family physicians, who suffer from tension and stress. Dr. Rickels, Director of the Psychopharmacology Research Unit of the University of Pennsylvania since 1962, was recently appointed to an endowed chair in Human Behavior. He has lectured widely and currently is a member of the Clinical Pharmacology Study Session of the National Institute of Mental Health ("NIMH"). Dr. Rickels has had extensive experience in the design, execution and review of clinical tests of drugs, including aspirin, for tension relief. He has often served as a consultant to industry on the development of protocols for such clinical tests. For three years, Dr. Rickels chaired FDA's OTC Panel on Nighttime Sleep-Aids, Daytime Sedatives and Stimulants, where the role of caffeine was explored. He has many publications on psychopharmacological topics, including the effects of aspirin on tension relief (Rickels, Tr. 1175–92; CX 515).

40. Dr. Howard Shapiro is Clinical Professor of Medicine at the University of California in San Francisco, Director of the Endoscopy Clinic and Co-Director of the Gastrointestinal Diagnostic Center at the University of California in San Francisco. He is board certified in internal medicine with a subspeciality in gastroenterology. He also presently serves as President of the Executive Medical Board of the Medical Staff (Chief of Staff of the Medical School Hospital) at the University of California in San Francisco. Dr. Shapiro is a consultant to the United States Public Health Hospital in San Francisco and is the author of numerous articles in the field of gastroenterology. In addition to his teaching responsibilities at the medical school, which include courses in gastroenterology and post-graduate courses for interns and residents, he also engages in the private practice of medicine, specializing in gastroenterology (Shapiro, Tr. 2916–23; RX 15).

41. Dr. Anthony F. Sliwinski, an Assistant Professor of Medicine at Georgetown University, is a recognized expert on rheumatic diseases. Dr. Sliwinski, who is also a consultant in rheumatic diseases to the Bethesda Naval Hospital and the Malcolm Grow Hospital at Andrews Air Force Base, has had extensive experience in the design and execution of clinical tests of rheumatologic drugs, including aspirin and aspirin-containing drugs. He has collaborated with others in a cooperative program for the clinical testing and evaluation of drugs for the [25]treatment of rheumatoid arthritis.

Dr. Sliwinski has had substantial training and experience in the development and review of clinical testing protocols. He is a member of various scientific societies and associations that complement his specialization in rheumatic diseases and has published on the subject. In addition, Dr. Sliwinski maintains a clinical practice involving 40–50 patients with various rheumatologic diseases (Sliwinski, Tr. 1102–20; CX 522).

42. Dr. Donald D. Stevenson is a member of the allergy/immunology division at the Scripps Clinic in La Jolla, California. Dr. Stevenson, who also has a clinical appointment in the Department of Internal Medicine at the University of California, has extensive training and experience in the clinical diagnosis and management of patients suffering from various allergies and asthmatic conditions, including those associated with aspirin. He has designed and conducted clinical tests of drugs to determine their safety and effectiveness in treating asthmatic and allergic conditions, and has conducted clinical tests utilizing oral challenge procedures in order to determine the asthmatic and allergic effects of aspirin ingestion. Dr. Stevenson has lectured and taught generally on the subject of immunology and specifically on the asthmatic and allergic effects of aspirin ingestion. He has published articles and studies relating to these topics. Dr. Stevenson is associated with various scientific and medical groups, including the American Academy of Allergy and the West Coast Allergy Society, which complement his specialization in asthma and allergy, and has participated in meetings and conferences held by such organizations (Stevenson, JTr. 1454–71).

43. Mr. Stanley Wallenstein has been an analgesic researcher at Memorial Sloan-Kettering Institute for Cancer Research since 1951. He and Dr. Raymond Houde have been engaged in hundreds of clinical trials involving the evaluation of analgesic drugs in postoperative and cancer pain models. He is recognized as an expert biostatistician and analgesic researcher, and has published over 100 articles. He has served as a consultant to the Veterans Administration Analgesic Study and the Federal Trade Commission (Wallenstein, Tr. 3415–23; Lasagna, Tr. 4099–4100; RX 32).

III. The Meaning Of The Challenged Advertisements

A. *Introduction*

44. The primary evidence in this proceeding on the meaning of the challenged advertisements and what they might [26]reasonably

have conveyed to consumers consists of the advertisements themselves.

45. In addition, there is secondary evidence in the form of:

(a) The expert testimony of Drs. Ivan Ross and Joseph Smith;

(b) Certain copy tests on Anacin television commercials, including the 20 ASI Audience Reaction Tests ("ASI tests") with emphasis on the verbatim comments of consumers (CX 402, 404–07, 409, 412, 414, 415 and 417–25);

(c) Certain consumer studies, including the 1969 Excedrin Study (CX 462), on consumer understanding of certain attributes of OTC internal analgesic products, such as effectiveness, strength and speed in relieving pain (CX 462Z112, Z114, Z115, Z143, Z144); and

(d) Certain documents from American Home's files evincing its awareness that certain advertising themes and presentational techniques were effective marketing devices.

46. In reaching his expert opinion as to whether the representations alleged in the Complaint were made in Anacin and APF advertising, and in coming to his conclusions as to whether the challenged advertisements could reasonably have been understood by consumers as making the representations alleged in the Complaint, Dr. Ross testified that, based on [27]his experience with consumers, he adopted their frame of mind which included, indirectly, their background or prior experience (Ross, Tr. 2313–14, 2353–55). He further testified that his judgments as to the representations made in the challenged advertisements for Anacin and APF were his independent expert opinion and were reached without reference to, or reliance upon, data contained in ASI tests or internal memoranda from the files of American Home (Ross, Tr. 1843, 2677). However, he made use of the latter materials as confirmatory evidence supporting his conclusions (Ross, Tr. 1841–43).

47. The mode of analysis utilized by Dr. Smith to determine whether the challenged advertisements made the representations alleged in the Complaint, and whether the challenged representations could reasonably have been understood by consumers as making the representations alleged in the Complaint, included the consumer's perception of a particular claim and the consumer's retention of that claim for some definite period of time (Smith, Tr. 7438–39). Consequently, Dr. Smith relied, in rank order, upon the following factors:

(a) the penetration studies;

(b) his own opinion based on looking at the advertisements and applying his model for interpreting advertising;
(c) the image studies; and
(d) the ASI tests (Smith, Tr. 5785, 7517).

48. Dr. Smith admitted that if one is interested in whether or not a particular advertisement made a particular claim, his reliance in his direct examination upon the evidence set forth above (F. 47, *supra*) would have been inappropriate. When the meaning of particular advertisements must be determined, he agreed that the ASI test data would be the only relevant material available. If he were to address this question, Dr. Smith stated that he would form his opinion based on his model for interpreting advertising, with the ASI data contributing to it. He testified that he would not rely on data in the penetration or image studies because such data do not address the question of whether or not a particular advertisement made a particular claim (Smith, Tr. 7442–49, 7454–58, 7518, 7562).

49. Therefore, in determining whether an advertisement makes a particular representation, the standard that has been used is whether, taken as a whole, the representation [28]constitutes one reasonable interpretation of the advertisement which some consumers might reasonably have understood the advertisement as making. In arriving at such a determination for each representation alleged to have been made in the Complaint, I have relied on my own knowledge and experience in viewing each advertisement, and have further utilized the opinions of the expert witnesses along with the ASI tests as confirmatory evidence of my conclusions.

B. *The ASI Audience Reaction Tests*

50. Among the various kinds of data which are useful in determining the message that consumers take from a particular advertisement are copy tests. Copy tests are typically conducted in a controlled environment on a specific advertisement or advertisements shortly after respondents have been exposed to such advertisement(s). The tests collect data from those surveyed on the content or meaning of such advertisements, generally without the use of a probing technique. The ASI tests conducted on Anacin television commercials were copy tests of those advertisements[3] (Ross, Tr. 2014–15, 2679; Smith, Tr. 7463–64).

[3] Another type of copy test, conducted on respondents who have seen an advertisement in an "at home" setting, is the Burke test. In a Burke test, planned commercials are interspersed throughout normal television programming. Approximately 24 hours after the advertisement has been shown, individuals are contacted by telephone and upon confirming that the respondents were viewing the program when the advertisement was run,

(Continued)

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51. The 20 ASI Audience Reaction Tests in the record (See F. 44, *supra*) were conducted by Audience Studies, Inc. ("ASI") for Ted Bates & Company, Anacin's advertising agency at the time, to measure the effectiveness of certain Anacin advertisements. The tests are of standardized design, the purpose of which was to evaluate consumer reactions to advertisements in terms of persuasiveness, involvement and recall (CX 402D). **[29]**

52. Gerald Lukeman, President of ASI, testified for complaint counsel concerning the design and general procedures of ASI testing (Lukeman, Tr. 204). Roger Seltzer testified for complaint counsel concerning the mechanics of conducting the ASI tests. Mr. Seltzer is the Executive Vice-President of ASI and is responsible for conducting the copy tests in ASI's theatre in Los Angeles, California (Seltzer, Tr. 312).

53. ASI's specialty involves research in communications, especially advertising. It has measured the effectiveness of advertising in all of the commonly used media, and it tests audiences' reactions to approximately 1,500 commercials every year. Its clients tend to be manufacturers and advertising agencies (Lukeman, Tr. 206–08).

54. ASI tests are conducted in a theatre in Los Angeles, housing an audience of approximately 350 respondents. The audience for each night is recruited from the Los Angeles metropolitan area, either in person or by telephone, to attend a preview of television programs with no charge or obligation except that they will be asked for their opinions of the programs they see. The tests are run almost every evening, so audiences are recruited on a continuing basis (Seltzer, Tr. 317–19).

55. As the audience enters the theatre, they are given seats, one-half of which contain dials which record the audience's instantaneous reactions to the commercials. Each member of the audience is given a questionnaire folder and, while seating is being completed, he or she is asked to answer questions about various demographic characteristics, television programming preferences, and use and preferences regarding different brands of products. Finally, the respondent is presented a list of products and asked which he or she would prefer to receive as a door prize (Seltzer, Tr. 322–24; CX 402Z027–Z031).

56. After the preliminary questionnaires have been filled out, the respondents are shown a warm-up cartoon. Next, they are shown a regular length television program, then a series of five commercials.

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they are asked to state how much, if anything, they recall about the particular advertisement. In general, only 22% of those contacted even remember seeing a particular commercial. No such copy tests were available in this proceeding (Smith, Tr. 5538–39, 5544–45, 5568–69).

Immediately after each commercial, the audience members fill out their responses to a page of questions about the advertisement (comprehension questions). At the conclusion of the five commercials, the audience views another television program. They fill out a brief questionnaire about the program and are asked to again indicate their preference from a list of products which may be offered as door prizes. They are [30]then shown a second cartoon, and are asked to complete a recall document which requests that the respondents write down all that they can remember about the five commercials they have seen (recall question). Thus, the respondents are presented with the recall question approximately 30 to 40 minutes after they have seen the commercials (Seltzer, Tr. 337). The evening is concluded when door prizes are awarded (Seltzer, Tr. 325–27).

57. ASI's audience recruitment procedures were carefully designed to produce a representative sample of the Los Angeles metropolitan area. The desired quota of respondents in each age and sex group are selected from 125 different sampling points in the Los Angeles area. Two selection procedures are used. Some respondents are recruited through personal contacts at high-traffic locations, such as shopping centers, while others are selected by telephone, using a reverse directory. Reverse directories list telephone numbers by street addresses, thereby helping ASI to ensure a geographic balance among the respondents recruited by telephone (Seltzer, Tr. 317–18).

58. Several controls are utilized on the night of the presentation in order to minimize any sampling error that may have arisen in the selection of respondents. Of the 350 viewers in the audience who fill out questionnaires, usually only 250 will be used. This is because certain segments of the population tend to be overrepresented in the theatre audience, and ASI requires that the sample it analyzes approximate the distribution of the Los Angeles population (Seltzer, Tr. 319–20). In addition, a control commercial is shown at the beginning of the set of five commercials. If the audience's answers to the questions asked about the control commercial vary significantly from the norms established by ASI through extensive prior experience with the commercial, then ASI has a good indication that significant sampling error has occurred. If that were to happen, the whole test would be conducted again before a different audience in order to assure ASI that the test results would be reliable (Seltzer, Tr. 325–27).

59. Based on these procedures, the data produced in ASI tests are reasonably representative of the effectiveness of commercials in

communicating messages to the residents of Los Angeles. Audience reaction tests run in other parts of the country by ASI have produced results similar to those obtained in Los Angeles (Seltzer, Tr. 321). **[31]**

60. ASI maintains an experienced and qualified department to assign numerical codes for keypunching and tabulating the audiences' verbatim responses in the recall document administered at the end of the testing session. Recall coding outlines are carefully devised based upon an examination of the responses submitted by at least one-half of the sample (Seltzer, Tr. 345–47).

61. Keypunching and tabulations are performed by ASI's own computer staff. The computer printouts of the data are verified for accuracy by the operator, the project director and the editing department. After tabulations are delivered to the project director, he performs the analysis of the responses and prepares the final report. In the Anacin copy tests, the tabulations of both the coded and the analyzed responses, along with the verbatim responses themselves, are available (See, *e.g.*, CX 402 O-R, Z021–Z026).

62. The technique used by ASI (a combination of comprehension and recall questions) does not elicit an exhaustive playback from respondents regarding all of the things that they might have perceived a tested advertisement as saying, showing or meaning (Ross, Tr. 1843–44, 2677–78).

63. The absence of verbatim comments indicating that respondents understood a tested Anacin advertisement as making an alleged representation does not, however, preclude the possibility that such representation was made or was understood by consumers as being made in that advertisement. A calculation of the absolute number of verbatim comments indicating that respondents understood a particular Anacin advertisement as making a certain representation is not sufficient, in and of itself, to prove (or disprove) whether such representation was made or was understood by consumers as being made in that advertisement (Seltzer, Tr. 363–68; Ross, Tr. 1844, 2677–78).

64. While complaint counsel's witnesses, Mr. Seltzer and Mr. Lukeman, testified that a minimum response rate of 7% to 10% for a particular claim or theme is required before they would conclude that a given advertisement communicated any message, they agreed that one must look at all of the surrounding circumstances (*i.e.*, the advertisement tested, the particular verbatim comments involved) before concluding that an intended message in a particular advertisement was not communicated (Lukeman, Tr. 237–38, 241–44, 247–48; Seltzer, Tr. 361–68). **[32]**

65. Of the 20 ASI tests in the record (F. 44, *supra*), 18 were conducted on advertisements which are either also in the record or were so similar to advertisements in the record that any differences are inconsequential (CX 402, 404, 406, 407, 409–12, 414, 415 and 418–25. See also Ross, Tr. 1850, 1859, 1867–68, 1876–77, 1879–80, 1882, 1884–85, 1889–90, 1893, 1897–98, 1901, 1906, 1920, 1923, 1924–25, 1930–31, 1952, 1954–58, 1970, 1978–79, 1989–90, 1993, 1995, 2002). Of the two remaining test reports, CX 405 concerned a tested advertisement which is sufficiently similar to CX 7 that evidence on consumers' understanding of the tested advertisement is relevant to the issue of how consumers would have understood CX 7 (Ross, Tr. 1980–81, 1984–87). Although CX 417 reports the results of a test on an advertisement which is not in the record, it contains evidence on how consumers would have understood a representation that Anacin had been proven as effective for the treatment or relief of headache pain as the leading prescription analgesic product (Ross, Tr. 1938–41).

C. *The Specific Allegations Relating To Anacin Advertising*

1. *Complaint Paragraphs 8(A)(1) and (3)*

66. American Home has represented that Anacin contains more pain-dulling ingredients per tablet than any other non-prescription internal analgesic product on the market (Comp. ¶ 8(A)(1)) and more than twice as much of its analgesic ingredient as any other analgesic product on the market (Comp. ¶ 8(A)(3)). These representations were made in the following Anacin advertisements: (a) CX 1, 5, 9, 10, 13–15, 20–23, 25, 38–40, 50–54, 56–61, 89–90, 92–97, 99–100, 102–07, 115–17, 119, 121–24, 142–44, 146–56, 160–64, 166, 169–73 and 181–85 made the representation contained in Paragraph 8(A)(1); and (b) CX 9, 10, 21–23 and 160–64 made the representation contained in Paragraph 8(A)(3).

67. The fact that Anacin advertisements made these representations is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 66, *supra*; Ross, Tr. 1849–50, 1852–55, 1865, 1868–72, 1874–79). Confirmatory evidence is contained in reports of the following ASI Audience Reaction Tests: (a) CX 404, 407, 409, 414, 415, 420 and 425 for the representation contained in Paragraph 8(A)(1); and (b) CX 407 and CX 415 for the representation contained in Paragraph 8(A)(3) (Ross, Tr. 1850, 1858–59, 1861–64, 1867–68, 1875–77). **[33]**

68. These representations were made through a variety of express and implied statements comparing the quantity of analgesic

in Anacin with the quantity of analgesic in various other non-prescription internal analgesic products.

69. In certain of the challenged advertisements, Anacin is represented as superior to all other leading headache tablets. For example:

(a) Of all the drugs to choose from, doctors most often recommend one pain-relieving ingredient. And Anacin has more of it than any leading headache tablet. (CX 13A and CX 14A).

(b) Anacin Tablets have more of the one strong pain reliever doctors specify most. More than any other leading headache tablet. (CX 20A. See also CX 25A, 39A, 40A and CX 142 through CX 144 for similar language).

(c) STRONGEST IN THE PAIN RELIEVER DOCTORS RECOMMEND MOST. Anacin contains more of this fast-acting pain reliever than any leading headache tablet. Anacin is strongest in the pain relieving medication doctors recommend most. That's why an Anacin tablet gives you extra power to relieve headache pain. (CX 153).

70. In certain of the challenged advertisements, Anacin is represented as superior to aspirin, buffered aspirin and other extra-strength products. For example:

(a) 2 Anacin Tablets have more of the one pain reliever doctors recommend most than 4 of the other leading extra strength tablets . . . . 2 Anacin contain more of this specific pain reliever than 4 of the others. (CX 21A and CX 22A. See also CX 1A, 9A and 163 for similar language).

(b) With all the pain relievers in the world to choose from, doctors most often recommend one specific ingredient for [34]headaches. Two Anacin Tablets have more of this ingredient than four of the other leading extra strength tablets. (CX 23A and CX 164).

(c) [T]wice as much of the strong pain reliever doctors recommend most as the other leading extra strength tablet. (CX 89, 90, 92, 93 and 95).

(d) . . . Anacin gives you 100% more of this pain reliever than the other leading extra strength tablet. (CX 115 through CX 117. See also CX 119 and CX 121 through CX 124 for similar language).

(e) Anacin's fortified formula has more of this specific pain reliever than any other leading headache tablet. In fact, Anacin is formulated twice as strong in the amount of this specific pain reliever as the other leading extra-strength tablet. (CX 170 and CX 171).

(f) EXTRA POWER . . . Anacin contains the pain reliever doctors recommend most. And Anacin gives you more of this pain reliever than an aspirin, buffered aspirin or the "so-called" extra-strength tablet . . . . See if Anacin tablets do not work better for you. CONTAINS WHAT 2 OUT OF 3 DOCTORS CALL THE GREATEST PAIN FIGHTER EVER DISCOVERED. (CX 152).

(g) [P]lain aspirin tablets even with buffering added have this much pain reliever. Anacin tablets go further and add an extra slice. All this extra pain reliever in every Anacin Tablet. (CX 30A).

(h) Doctors know Anacin contains more of the specific medication they recommend most for pain than the leading aspirin, buffered aspirin, or extra-strength tablets. (CX 105 and CX 107. See also CX 106 for similar language).

(i) [A]ll three leading pain relievers [aspirin, buffered aspirin and Anacin superimposed as part of a graph] reach [35]an effective level in your bloodstream in

minutes. But in the final analysis the highest level is reached by Anacin. This higher level is the extra pain reliever Anacin provides. (CX 50A through 53A).

71. Challenged advertisements such as those cited (F. 66(a), *supra*) made the representation alleged in Paragraph 8(A)(1) because consumers would have understood them as representing that, whatever the composition of Anacin's pain reliever was (*i.e.*, whatever the chemistry of its pain-dulling or relieving ingredient(s) was), Anacin contained a greater amount of pain reliever than that contained in any other non-presciption internal analgesic product (Ross, Tr. 1851). Thus, consumers would have understood a claim regarding the greater quantity of pain reliever to mean more of what relieves pain, regardless of whether it consists of one ingredient or several.

72. Certain of the challenged advertisements (F. 66(b), *supra*) also made the representation alleged in Paragraph 8(A) (3), which is a more extreme version of the representation alleged in Paragraph 8(A)(1), because, if consumers understood an advertisement as representing that Anacin contained more than twice as much of its analgesic ingredient, then they would also have understood it as representing that Anacin contained more pain reliever per tablet than any other non-prescription internal analgesic product (Ross, Tr. 1852, 1875).

73. The representation alleged in Paragraph 8(A)(1) was made in a variety of ways in the challenged Anacin advertisements (Ross, Tr. 1868–69). Among the statements and techniques used are the types of comparative superiority representations for which examples have been given (F. 69 and 70, *supra*).

74. The challenged advertisements comparing Anacin with other leading analgesic products would have been understood by consumers as representing that Anacin was superior in the quantity of pain reliever it contained to the products which otherwise are the best in the non-prescription internal analgesic product category (Ross, Tr. 1870).

75. Dr. Smith, respondents' expert, agreed that, based on his model for interpreting advertising, some not insignificant number of consumers could have understood advertising comparing Anacin with other leading headache tablets to be a comparison with the best products in the product class or to **[36]**include all of the major products in the product class. He admitted that an everyday principle of our lives as consumers is that if you are better than the best, you are necessarily better than everything else (Smith, Tr. 7505–07, 7516).

76. The challenged advertisements comparing Anacin with aspi-

rin, buffered aspirin and the other extra-strength product would have been understood by consumers as a comparison with all other non-prescription internal analgesic products on the market and, therefore, as representing that Anacin contained more pain-dulling ingredients or pain reliever per tablet than any other non-prescription internal analgesic product on the market (Ross, Tr. 1854, 1872). Anacin's main competitors in the non-prescription internal analgesic market have been Bayer Aspirin, Bufferin, Excedrin, and variations thereof (and, after the complaint in this proceeding was issued, Tylenol) (CX 611Z146).

77. Dr. Smith admitted that all of the major products in the non-prescription internal analgesic product class fell into one of these three categories (*i.e.*, aspirin, buffered aspirin or extra-strength) when at least some of the challenged advertising was disseminated. He agreed that, based on his model for interpreting advertising, some not insignificant number of consumers could have considered these enumerated categories as representing an exhaustive list of all of the types of products in this product class (Smith, Tr. 7503–05).

78. The challenged advertisements comparing Anacin with the other extra-strength product or the other leading extra-strength product, *i.e.*, Excedrin (Smith, Tr. 7503), would have been understood by consumers as representing that Anacin contained more pain-dulling ingredients or pain reliever than any other non-prescription internal analgesic product on the market (Ross, Tr. 1854–55, 1859–63, 1865 1868).

79. As previously noted (F. 75, *supra*), superiority over the recognized best in the product category in a particular respect implies superiority over the entire category. Therefore, where the challenged advertising represented that Anacin had more than twice as much pain reliever, as opposed to merely having more or twice as much, the representation alleged in Paragraph 8(A)(3) was made (Ross, Tr. 1875–79). **[37]**

80. The challenged advertisements which represented that Anacin contained more, or more than twice as much, of the pain reliever doctors recommend most than other products would have been understood by consumers as representing that Anacin contained more, or more than twice as much, total pain reliever than other products, *i.e.*, more of whatever it is in such products that relieves pain. Thus, consumers would not pause to think about whether Anacin had more of one ingredient as opposed to having more pain reliever overall (Ross, Tr. 1854–55, 1878–79).

81. This understanding is confirmed by documentary evidence provided by the verbatim comments in ASI Audience Reaction Tests

on Anacin advertisements, where respondents rarely distinguished between more ingredients and more of a particular ingredient (See, *e.g.*, CX 409 and CX 415; Ross, Tr. 1859–63, 1867–68, 1876–77).

82. Dr. Smith conceded that it is difficult to draw such a distinction and, therefore, that consumers might view advertisements such as CX 1 as representing that Anacin contained more pain reliever, whether that pain reliever is a single ingredient or a group of ingredients (Smith, Tr. 7502–03, 7521). Based on his model for interpreting advertising, he testified that advertisements such as this might communicate to consumers that Anacin has more of whatever is necessary to relieve pain than aspirin, buffered aspirin and Excedrin, the other extra-strength product, or more than twice as much pain reliever as Excedrin in the case of advertisements such as CX 9 (Smith, Tr. 7496–97, 7503, 7508–09).

83. In addition to perceiving the representations alleged in Paragraphs 8(A)(1) and (3), consumers would have understood advertising representations that Anacin contained more pain relieving ingredients, or pain reliever, than other products as representing that Anacin was stronger and provided more pain relief than other products (Ross, Tr. 1854, 1855–58, 1862–64). Indeed, American Home itself regarded representations about Anacin's greater quantity of pain reliever as representations of superior strength and more pain relief (CX 306B and CX 327; DeMott, Tr. 4743–44, 4747–48).

84. Dr. Smith testified that, based on his model for interpreting advertising, some consumers might have understood CX 23 to mean that Anacin was stronger than at least Excedrin because it had more of the best pain reliever (Smith, Tr. 7566–67, 7570–71). [38]

2. *Complaint Paragraph 8(A)(2)*

85. American Home has represented that Anacin's analgesic ingredient is unusual, special, and stronger than aspirin (Comp. ¶ 8(A)(2)). This representation was made in the following Anacin advertisements: CX 1, 5, 26, 28, 41–45, 47–49, 59–60, 62–63, 65, 81–84, 89, 93–94, 115–17, 119, 121–24, 142–44, 146–48, 151, 154–56, 169–73 and 176 through 178.

86. The fact that Anacin advertisements made this representation is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 85, *supra*; Ross, Tr. 1872, 1879–82, 1889, 1892–96). Confirmatory evidence is contained in reports of the following ASI Audience Reaction Tests: CX 404, 421 and 422 (Ross, Tr. 1879, 1882, 1889–90, 1893.

87. This representation was made through a variety of express

and implied statements conveying that Anacin was qualitatively different from and better than aspirin, and that it either contained no aspirin or it contained some additional pain relieving ingredient which made it a better formulation for pain relief than aspirin.

88. In certain of the challenged advertisements, Anacin is specifically contrasted with aspirin. For example:

(a) Anacin starts with as much pain reliever as the leading aspirin tablet. Then adds an extra core of this specific fast acting ingredient against pain. (CX 41A through CX 45A).

(b) Of the 3 leading pain relievers, only Anacin has this special combination of ingredients that relieves pain fast, also its tension, irritability and depression. (CX 151).

(c) [W]hile ordinary aspirin, buffered aspirin and Anacin start with the same amount of pain reliever, Adult Strength Anacin adds 23% more . . . . [T]hen Anacin adds an extra ingredient not found in the others. (CX 63. See also, CX 59, 60 and 65).

89. In certain of the challenged advertisements Anacin is described as a different, distinctive, or unique product. For example: **[39]**

(a) An exceptional formula . . . . (CX 26A and CX 28A).

(b) An adult strength pain reliever. Not even recommended for young children. (CX 62).

(c) . . . special fortified formula . . . . (CX 89, 93, 94, 142–44 and 156).

(d) [A] special fortified combination of ingredients and only Anacin has this formula. (CX 115 through CX 117. See also, CX 142 through CX 144).

(e) Anacin Tablets are so effective because they are like a doctor's prescription. That is a combination of ingredients. Anacin contains the pain reliever most recommended by doctors plus an extra active ingredient not found in leading or buffered aspirin . . . . The big difference in Anacin makes a big difference in the way you feel. (CX 151).

(f) Only Anacin has this fortified combination of ingredients . . . . (CX 154 through CX 156).

90. Challenged advertisements such as those cited (F. 85, *supra*) made the representation alleged in Paragraph 8(A)(2) because consumers would have understood them as representing that Anacin was qualitatively different from aspirin; that is, either it contained no aspirin or, in addition to aspirin, it contained a non-aspirin component which was of fundamental importance to Anacin's effectiveness as a pain reliever when compared with aspirin (Ross, Tr. 1880–82, 1889, 1894–96).

91. The representation alleged in Paragraph 8(A)(2) was made in a variety of ways in the challenged Anacin advertising (Ross, Tr. 1892, 1896). Among the statements and techniques used are those for which examples have been given (F. 88 and 89, *supra*).

92. Whenever there is a reference to aspirin in the challenged

advertisements that made the representation in Paragraph 8(A)(2), it is by way of comparing Anacin to aspirin (Ross, Tr. 1880, 1882, 1896). The thrust of these advertisements is to differentiate Anacin from aspirin (Smith, Tr. 7550–51). [40]

93. Indeed, respondents' witness, George DeMott, the individual at Whitehall who bore continuous responsibility for Anacin and APF since 1968, testified that Anacin's basic ingredient was described as something other than aspirin so as to make claims in Anacin advertising distinguishable from claims in Bayer Aspirin advertising (DeMott, Tr. 4657–59).

94. Where such advertising represented that, for example, Anacin contained an "extra core" of a fast acting ingredient against pain, consumers would have understood the representation as claiming that Anacin contained an analgesic ingredient which was not aspirin (Ross, Tr. 1882–85, 1890–92).

95. Dr. Smith, respondents' expert witness, conceded that, based on his model for interpreting advertising, some consumers could have understood CX 41A as representing that Anacin's analgesic ingredient was something other than aspirin. He also testified that some consumers could have understood CX 173 as representing that Anacin's analgesic ingredient is different from aspirin (Smith, Tr. 7551–53, 7557–58).

96. Consumers would have understood advertising which represented that Anacin adds an extra ingredient as meaning that this ingredient is an analgesic or pain reliever (Ross, Tr. 1894–96).

97. Where such advertising represented that Anacin was, for example, specially fortified, a compound, an exceptional formula or a special combination of ingredients, consumers would have understood the representation as claiming that Anacin's analgesic ingredient was not aspirin or aspirin alone (Ross, Tr. 1892–96).

98. In addition to perceiving the challenged advertising as representing that Anacin's analgesic ingredient was unusual, special, stronger or in some other way qualitatively different from and better than aspirin, consumers would also have understood such advertising as representing that Anacin was more effective for the relief of pain than aspirin (Ross, Tr. 1881).

3. *Complaint Paragraph 17*

99. American Home has represented that certain scientific tests or studies conducted by or on behalf of American Home prove that Anacin is as effective for the treatment or [41]relief of headache pain as the leading prescription analgesic product and more effective for

the treatment or relief of such pain than any other non-prescription internal analgesic product (Comp. ¶ 17). These representations were made in the following Anacin advertisements: CX 81–84, 105–07, 126–37, 141, 173–77 and 179.

100. The specific tests or studies conducted by or on behalf of American Home which are referred to in the challenged advertisements are the clinical studies reported in CX 301 and CX 302. To the extent that the challenged advertisements set out specific details of clinical tests, they are the details from CX 301 and/or CX 302 (Tr. 406–07).

101. The fact that Anacin advertisements made these representations is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 99, *supra*; Ross, Tr. 1932–35, 1938). Confirmatory evidence is contained in a report of an ASI Audience Reaction Test (CX 417; Ross, Tr. 1938–42).

102. American Home has admitted representing that certain tests and studies (*i.e.*, CX 301 and CX 302) show that Anacin is as effective for the treatment of headache pain as the leading prescription analgesic product (Ans. of American Home, ¶ 17; Tr. 406–07).

103. In each of the challenged advertisements in which the representations in Paragraph 17 were made, there is an explicit representation that the specified scientific tests or studies (*i.e.*, CX 301 and CX 302) prove beyond a doubt, show, verify and/or substantiate Anacin's efficacy as compared with that of the leading prescription analgesic product (See advertisements listed in F. 99, *supra*).

104. The challenged advertisements further represent, through a variety of express and implied statements, that the studies referred to (*i.e.*, CX 301 and CX 302) also proved that Anacin was more effective for the treatment or relief of headache pain than any other non-prescription internal analgesic product.

105. Certain of the challenged advertisements represent that, out of the entire universe of OTC analgesic drugs, Anacin should be the drug of choice because it, and it alone, was proven equal to the best, *i.e.*, the leading prescription product. For example:

(a) But be sure it's Anacin you take because it's the tablet which these tests proved is just as effective as the leading pain relief prescription. (CX 126 and CX 127). [42]

(b) The makers of world-famous Anacin Tablets have always known Anacin is one of the most powerful and fastest acting pain relievers . . . . [They] decided to compare its effectiveness for headaches with that of the leading pain relief prescription of doctors . . . . These tests were conducted by physicians who specialize in scientific research . . . . Tests verified beyond a doubt that Anacin gives the same complete

headache relief as the product for which doctors wrote 21 million prescriptions last year. (CX 128 through CX 130).

(c) Physicians who specialize in scientific research conducted tests on 826 patients . . . . Additional tests made by other doctors verified beyond a doubt that Anacin gives the same complete headache relief as the pain reliever so powerful it needs a prescription . . . . Millions of headache sufferers must consider Anacin superior because it's America's largest selling analgesic. (CX 132, 134 and 137. See also CX 135).

(d) How do you find out how good you are? Test yourself against the best . . . . Hundreds of people in a carefully supervised clinical test proved that Anacin was just as strong as the leading prescription. (CX 173).

106. Certain of the challenged advertisements also contain explicit comparisons to other non-prescription internal analgesic products. For example:

(a) In clinical tests on hundreds of headache sufferers, it has now been proven beyond a doubt that Anacin delivers the same complete headache relief as the leading pain relief prescription . . . . Doctors know Anacin contains more of the specific medication they recommend most for pain than the leading aspirin, buffered aspirin, or extra strength tablet. Now you know that Anacin gives you the same complete headache relief as the leading pain relief prescription. (CX 105 and CX 107. See also CX 106). **[43]**

(b) Physicians conducted tests on hundreds upon hundreds of patients who complained of tension headaches . . . . Results from these tests proved beyond a doubt that Anacin gives the same complete relief . . . as the leading prescription of doctors . . . . Here is further convincing evidence of the effectiveness of Anacin. In another survey, twice as many doctors, reporting, said they prefer Anacin's formula to relieve pain to that of the other extra-strength tablet . . . . From the results of these tests . . . (CX 131).

107. Challenged advertisements such as those cited (F. 99, *supra*) made the representations alleged in Paragraph 17 because they explicitly represent that specific clinical tests proved Anacin to be as effective in treating or relieving headache pain as the leading prescription product (Smith, Tr. 5883–84).

108. Consumers would have understood such a representation as also representing that Anacin was proven by such tests to be more effective for the treatment or relief of headache pain than any other non-prescription internal analgesic product because, *inter alia*, consumers generally perceive prescription products to be stronger and more effective than non-prescription products (Ross, Tr. 1933–34, 1937–40, 1941; Smith, Tr. 7576). In addition to this inherent implication of superiority, certain of the challenged advertisements directly convey the message that the leading prescription analgesic is stronger and more powerful than other OTC analgesics, with the exception of Anacin (See, *e.g.*, CX 132, 134, 137 and 173).

4. *Complaint Paragraph 20*

109. American Home has represented that based on a survey: (1) twice as many specialists in internal medicine prefer Anacin for the treatment or relief of headache pain to any other non-prescription internal analgesic product, (2) more physicians recommend Anacin for the treatment or relief of headache pain than any other non-prescription internal analgesic product, and (3) such recommendation or preference constitutes convincing proof that Anacin will treat or relieve headache pain more effectively than any other non-prescription internal analgesic product (Comp. ¶ 20). These representations were made in the following Anacin advertisements: CX 47–49, 81–84, 131, 146–48 and 176 through 180. **[44]**

110. The fact that Anacin advertisements made these representations is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 109, *supra*; Ross, Tr. 1929–32). Confirmatory evidence is contained in a report of an ASI Audience Reaction Test which was conducted on CX 47, an advertisement (CX 424; Ross, Tr. 1930–31).

111. These representations were made in each of the challenged advertisements citing the survey of doctors referred to in Complaint Paragraph 21. Such advertisements made these representations through a variety of express and implied statements about the preferences and recommendations of physicians and the convincing nature of such preferences or recommendations in proving the superior efficacy of Anacin as compared with other non-prescription internal analgesic products. For example:

(a) DOCTORS' CHOICE . . . Anacin formula 2 to 1 [superimposed on the screen]. Of the doctors who chose between the formulas of the two leading extra strength tablets [,] twice as many chose the Anacin formula for pain relief [,] that's the Anacin formula two to one! (CX 47A. See also CX 48A and CX 49A).

(b) Here is other convincing evidence about Anacin. Replies from a survey of over 1600 specialists in internal medicine showed twice as many doctors said they would recommend their patients use the Anacin formula to relieve pain over that of the other leading extra-strength tablet. Just consider that—twice as many doctors prefer Anacin. (CX 81 through CX 84).

(c) Physicians conducted tests on hundreds upon hundreds of patients . . . . Results . . . proved beyond a doubt that Anacin gives the same complete relief . . . as the leading prescription . . . . Here is further convincing evidence of the effectiveness of Anacin. In another survey, twice as many doctors, reporting, said they prefer Anacin's formula to relieve pain to that of the other extra-strength tablet. (CX 131). **[45]**

(d) [T]ake Anacin for fast, effective, doctor-proved relief. You see, Anacin contains more of the pain reliever doctors recommend most. In fact, in a national survey, doctors were asked to choose between the leading extra-strength pain relief formulas,

and of those who did, twice as many chose the Anacin formula—the extra-strength pain relief formula doctors prefer 2 to 1. (CX 146 through CX 148).

(e) You certainly don't want to settle for second best relief . . . . Replies from over 1600 doctors who specialize in internal medicine showed twice as many doctors prefer extra-strength Anacin Tablets over the other leading extra-strength tablet . . . . [T]hey consider Anacin the better formula for headaches. Not surprising because another medical research report proves Anacin . . . . as effective . . . as the leading prescription. (CX 176).

(f) It's one thing to think you're good, but it's something extra when someone else proves it . . . . [T]his survey we made where we asked doctors who specialize in internal medicine which formula they prefer for headache pain . . . . They didn't just pick Anacin's. [T]he doctors responding preferred Anacin's two to one over the other extra-strength tablet. Specialists preferred Anacin's two to one. (CX 180).

112. Challenged advertisements such as those cited (F. 109, *supra*) made the representations alleged in Paragraph 20 for the following reasons: (1) consumers would have understood advertising based on the results of a survey of specialists in internal medicine as representing that the survey was a representative one that fairly reflected medical opinion and, therefore, that twice as many doctors, physicians or specialists in internal medicine preferred Anacin for the treatment or relief of headache pain; (2) consumers would have believed that such physicians would act on their preferences in recommending a non-prescription internal analgesic; and (3) consumers would have understood any **[46]**advertising representation based on doctors' preferences or a survey of doctors favoring Anacin as evidence or proof that Anacin would treat or relieve headache pain more effectively (Ross, Tr. 1928–32).

113. Certain of the challenged advertisements explicitly represented that this survey of doctors constituted convincing evidence about Anacin (CX 81 through CX 84; Ross, Tr. 1931–32).

114. Dr. Smith testified that a scientific survey of medical experts constitutes convincing proof that Anacin is preferred over Excedrin by doctors. He admitted that certain challenged Anacin advertising conveyed the message to consumers that there was convincing proof that twice as many specialists in internal medicine chose Anacin as chose the other leading extra-strength tablet in this survey. Finally, Dr. Smith agreed that a preference by doctors could reasonably be interpreted by at least some consumers as a claim of greater effectiveness (Smith, Tr. 5903, 7598).

115. Since consumers would have understood representations comparing Anacin with the other extra-strength product, or the other leading extra-strength product, as a comparison with the product that is otherwise the best in the product category, these advertisements represented that Anacin was superior to any other non-prescription internal analgesic product (See F. 75, *supra*).

5. *Complaint Paragraph 12(A)*

116. American Home has represented that a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic (Comp. ¶12(A)). This representation was made in the following Anacin advertisements: CX 1, 5, 9–10, 13–15, 20–23, 25, 38–40, 47–54, 56–61, 81–84, 89–90, 92–97, 99–100, 102–07, 115–17, 119, 121–24, 126–37, 142–44, 146–56, 160–64, 166 and 169 through 185.

117. The fact that Anacin advertisements made this representation is demonstrated by the advertisement themselves and confirmed by expert testimony (Advertisements listed in F. 116, *supra*; Ross, Tr. 1897–98, 1900–01, 1905–06, 1919–20). Confirmatory evidence is contained in reports of the following ASI Audience Reaction Tests: CX 404, 407, 409, 414, 415, 420, 424 and 425 (Ross, Tr. 1861, 1900, 1906–07, 1920–21, 2683). Confirmatory ASI verbatim comments **[47]** include not only those concerned with comparative pain relief, but also those concerned with comparative strength, speed and quantity of ingredient(s) (See F. 120 and 121, *infra*).

118. This representation was made through a variety of express and implied statements concerning Anacin's superiority to other products in terms of pain relief, or in terms of particular attributes or dimensions of pain relief such as strength, power and speed. For example:

(a) There's not much difference in pain relievers that you can see. But in your bloodstream, the differences are very real. While all three leading pain relievers reach an effective level in minutes, in the final analysis, only one of them hits and holds the highest level. Anacin. This difference is the extra pain reliever Anacin provides . . . . The difference in Anacin is the higher level of pain reliever. (CX 54A. See also CX 149, 182 and 183 for similar language).

(b) No tablet you can buy has the strong yet safe formulation in Anacin. See if Anacin Tablets don't work better for you. (CX 153).

(c) See if the special fortified formula in Anacin Tablets doesn't work better for you. (CX 156).

(d) It gives you extra medication for extra pain-relief power. Headache sufferers need extra pain-relief power. And that's what Anacin gives. (CX 155).

(e) Only today's Anacin has this fortified combination of ingredients with the medication doctors prescribe most for pain-relief. And today's Anacin is now twice as strong in this medication as any other extra-strength tablet. (CX 156).

(f) [W]e can promise you extraordinary relief with Anacin. Anacin with more to give. (CX 172). **[48]**

(g) It's time to stop thinking there's no difference in pain relievers. Doctors' tests prove the differences are very real. (CX 184).

119. Challenged advertisements such as those cited (F. 116, *supra*), made the representation alleged in Paragraph 12(A) because

consumers would have understood them as representing that Anacin was a more effective pain reliever than any other non-prescription internal analgesic product (Ross, Tr. 1899).

120. Effectiveness in reducing pain is the essential purpose for the analgesic product category. Advertisers of analgesic seek to convey the message of superior effectiveness in reducing pain by distinguishing brands in terms of themes such as speed, strength, quantity of ingredients and doctors' recommendations because these themes are regarded by consumers as symbols for effectiveness in reducing pain (Smith, Tr. 5772–74, 7558).

121. Certain of the challenged advertisements, which focus on Anacin's superiority to other products on a variety of attributes or dimensions such as strength or speed, would have been understood by consumers as claims of superior pain relief because speed and strength are among the meanings consumers give to effectiveness (Ross, Tr. 1900, 1902–05, 2017, 2019–23, 2404–07; CX 462Z112, Z114, Z115, Z117, Z143, Z144; CX 306B and CX 327).

122. The challenged representation of greater effectiveness was also made wherever advertising represented that Anacin contained more pain-dulling ingredients or pain reliever than any other non-prescription internal analgesic. Moreover, consumers could readily translate "more pain reliever" to "more pain relief." For these reasons, consumers would have understood such advertisements as representing that Anacin provided more pain relief than other products, *i.e.*, that Anacin was more effective for the relief of pain (Ross, Tr. 1852–55, 1858–63; See F. 83, *supra*). Therefore, the representation alleged in Paragraph 8(A)(1) or 8(A)(3) was made.

123. The challenged representation of greater effectiveness was also made in advertisements which represented, *inter alia*, that Anacin contained more of the pain reliever doctors recommend most than other products (Ross, Tr. 1853–55). **[49]**

124. It was also made in advertisements which represented, *inter alia*, that Anacin provided more pain reliever or relief than Excedrin, the other extra-strength or other leading extra-strength product (Ross, Tr. 1858–59, 1861, 1868, 1899–1901. See F. 78, *supra*).

125. Respondents' witness, Dr. Smith, conceded that, based on his model for interpreting advertising, those consumers who understood an advertisement such as CX 23 to mean two Anacin are equal to four Excedrin might interpret that to mean equality in terms of effectiveness. He also admitted that at least some consumers could interpret a claim that the advertised product is better than the one which is recognized as the best to be a superiority claim vis-a-vis the entire product category (Smith, Tr. 7520, 7566, 7568).

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126. The challenged representation was also made in advertisements which represented, *inter alia*, that Anacin's extra pain reliever enables it to reach the highest effective level in the bloodstream (CX 50–54 and CX 56 through CX 58; Ross, Tr. 1907–09. See also CX 356A-D, G, I and CX 340).

127. Dr. Smith agreed that, based on his model for interpreting advertising, the explicit representation in CX 54 that Anacin reaches a higher, more effective blood level than the other two leading pain relievers could be interpreted by some consumers as representing that Anacin provides more effective pain relief than the other two leading products (Smith, Tr. 7561–62, 7564).

128. Finally, the challenged representation of greater effectiveness was also made in advertisements such as CX 21, which compares the pain reliever content of Anacin and the other leading extra-strength tablets. This theme was played back in the ASI test reported in CX 415 not only in terms of quantity of ingredients, but also in terms of comparative speed, strength and effectiveness (Smith, Tr. 7542–44).

129. The representation that Anacin was unusual, special, stronger, or in some way qualitatively different from another product or products would have been understood by consumers as claiming that Anacin was more effective for the relief of pain than such other product or products. Therefore, wherever the representation alleged in Paragraph 8(A)(2) was made, the representation that Anacin was more effective for the relief of pain than aspirin was also made. **[50]** Furthermore, in certain of these advertisements, Anacin was represented as unusual, special, stronger, or in some way qualitatively different from all other non-prescription internal analgesics; such advertisements also made the representation alleged in Paragraph 12(A) (Ross, Tr. 1863, 1920–21. See F. 98, *supra*).

130. The representation alleged in Paragraph 12(A) was made wherever the representations alleged in Paragraph 17 were made (See F. 99–108 and advertisements listed in F. 99, *supra*).

131. The representation alleged in Paragraph 12(A) was made wherever the representations alleged in Paragraph 20 were made (See F. 109–115 and advertisements listed in F. 109, *supra*).

6. *Complaint Paragraph 10(A)*

132. American Home has represented that it has been established that a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic (Comp. ¶ 10(A)). This representation was made in

the following Anacin advertisements: CX 1, 5, 9, 10, 13–15, 20–23, 25, 38–40, 47–54, 56–58, 61, 81–84, 89, 90, 92–97, 99, 100, 102–07, 115–17, 119, 121–24, 126–37, 142–44, 146–56, 160–64, 166 and 169 through 185.

133. The fact that Anacin advertisements made this representation is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 132, *supra*; Ross, Tr. 1921–28). Confirmatory evidence is contained in reports of the following ASI Audience Reaction Tests: CX 409, 414, 424 and 425 (Ross, Tr. 1923–24).

134. This representation was made through a variety of express and implied statements conveying that Anacin's comparative superiority for the relief of pain was based on scientific or medical fact or opinion.

135. In certain of the challenged advertisements, explicit reference is made to underlying scientific or medical proof. For example:

(a) "[M]edically proved Anacin overpowers headache pain" or "medically proved Anacin overpowers pain." (CX 50A through CX 53A). **[51]**

(b) "[M]edically proven" or "medically proved." (CX 115-17, 142–44 and 149).

(c) "[D]octor-proved relief." (CX 146 through CX 148).

(d) "Medical research has definitely established that the most reliable medication in the treatment of arthritis . . . is the compound in today's Anacin Tablets . . . . Anacin's great pain fighter is the first choice of doctors . . . ." (CX 154).

(e) In each of the advertisements in which the representations alleged in Paragraph 17 or Paragraph 20 are made, there is reference to tests, studies and/or surveys (Advertisements listed in F. 99 and 109, *supra*).

136. In certain of the challenged advertisements, graphs, scientific formulas and/or symbols are used in making this representation (See, *e.g.*, CX 14A, 15A, 50A–54A, 56A–58A, 61 and 149).

137. In certain of the challenged advertisements, the approval or approbation of doctors is used in making this representation. For example:

(a) [M]ore of the specific pain reliever doctors recommend most . . . . (CX 9A. See also CX 20A–23A, 25A, 39A, 40A, 146–48, 163 and 164 for similar language).

(b) Of all the drugs to choose from, doctors most often recommend one pain relieving ingredient. And Anacin has more of it than any other leading headache tablet. (CX 13A and CX 14A).

138. Consumers would have understood challenged advertisements such as those cited (F. 132, *supra)* as representing that Anacin's superiority to other non-prescription internal analgesics had been established because such advertisements were based, at

least in part, on the opinions of doctors, the use of scientific symbols or formulas or, in some other way on scientific or medical fact, proof, evidence, authority or opinion (Ross, Tr. 1922–28). Therefore, the representation alleged in Paragraph 10(A) was made. **[52]**

139. As respondents' own expert witness, Dr. Smith, indicated, consumers believe that: (1) advertisers have reasonable grounds for the advertising claims they make; (2) advertisers are not allowed to make claims unless they have good reasons for believing that they are true; and (3) with a serious product category, such as a drug, advertisers need to have a generally higher level of support or better grounds for making claims (Smith, Tr. 7584–86).

140. Consumers would have understood the challenged advertisements which explicitly represented that Anacin was medically proved or proven as representing that Anacin's superior efficacy for the relief of pain had been established (Ross, Tr. 1926).

141. For instance, CX 154 expressly represents that the superior efficacy of the compound found in Anacin has been definitely established by medical research. Dr. Smith agreed that when advertising copy makes a statement such as in CX 154 (F. 135(d), *supra*), consumers will believe that that statement is true, could not be made unless it is true and is adequately supported (Smith, Tr. 7590–91).

142. Dr. Smith admitted that an advertising claim will be perceived by consumers as having been established if it is supported by scientific evidence such as tests (Smith, Tr. 7583).

143. The challenged advertisements which made the representations alleged in Paragraphs 17 (See F. 99–108 and advertisements listed in F. 99, *supra*) or 20 (See F. 109–15 and advertisements listed in F. 109, *supra*) would also be understood by consumers as making the representation alleged in Paragraph 10(A) (Ross, Tr. 1922).

144. For instance, Dr. Smith agreed that if advertisements such as CX 81 represented that Anacin was more effective than other OTC analgesics, then the reference in that advertisement to clinical tests would constitute scientific evidence such that consumers would perceive this claim as established (Smith, Tr. 7588).

145. Consumers would have also understood this representation to have been made in the challenged advertisements which made use of graphs, scientific formulas and/or symbols (F. 136, *supra*). **[53]**

146. For example, consumers would have understood the claim regarding the difference among pain relievers in the bloodstream in CX 54A as based on authoritative medical opinion (Ross, Tr. 1924–25). Upon being confronted with a scientific graph measuring blood levels, at least some consumers would understand those blood levels

as having been ascertained through a scientific test (Smith, Tr. 7588–89). Also, Dr. Smith admitted that an advertisement such as CX 14 could be perceived by some consumers as a doctor reaching for a medical treatise. Many consumers would believe that there is scientific evidence behind medical treatises (Smith, Tr. 7589–90).

147. Finally, consumers would have also understood this representation to have been made in the challenged advertisements which referred to the approval or approbation of doctors (F. 137, *supra*) for several reasons. First, medical approbation or approval of an advertised product is important to, and respected by, consumers. Second, consumers believe that doctors have good reasons for recommending the products they do (Smith, Tr. 5817, 5936). Third, when an Anacin advertisement talked about doctors' approval, respondents in ASI Audience Reaction Tests said doctors approve, doctors recommend or doctors prefer with some frequency in their verbatim comments (Smith, Tr. 7593).

7. *Complaint Paragraph 8(A)(4)*

148. American Home has represented that within approximately 22 seconds after taking Anacin a person may expect relief from headache pain (Comp. ¶ 8(A)(4)). This representation was made in the following Anacin advertisements: CX 1, 142–44, 151 and 153.

149. The fact that Anacin advertisements made this representation is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements in F. 148, *supra*; Ross, Tr. 1942–51, 1960–C, 1962, 1964–67).

150. This representation was made through a variety of express and implied statements, and through the use of visual and audio techniques claiming that within approximately 22 seconds after taking Anacin, consumers could expect to begin to perceive some relief from headache pain. The representation alleged in Paragraph 8(A)(4) appeared in both television and print advertisements (See advertisements listed in F. 148, *supra*). For example: **[54]**

(a) So quickly that in the short time it takes you to kiss a baby [,] in . . . just . . . twenty-two seconds to be exact [,] twenty-two seconds . . . after Anacin is in your bloodstream, its already starting to work on your headache. (CX 1A).

(b) In 22 seconds after entering your bloodstream this special fortified formula is speeding relief to your nervous headache. It promptly relieves the pain . . . . You can bounce back fast . . . . (CX 142 through CX 144).

(c) Anacin acts fast! In 22 seconds after entering your bloodstream, Anacin is speeding relief to your headache. Pain goes quickly . . . (CX 153. See also CX 151 for similar language).

151. Challenged advertisements such as those cited (F. 148,

supra) made the representation alleged in Paragraph 8(A)(4) because consumers would have understood them as representing that within approximately 22 seconds after taking Anacin, they could expect to perceive some relief from headache pain, even though all of their headache pain would not necessarily be gone (Ross, Tr. 1943).

152. Consumers would perceive the specific reference to "twenty-two seconds" to be directed towards the intended effect of Anacin, which is the relief of headache pain.

153. In CX 1A (the storyboard of a television advertisement), the video portion (showing a woman with a headache who, in the 22 seconds it takes to kiss a baby, begins to feel better) is consistent with and supportive of this representation (Ross, Tr. 1944–45, 1947, 1962). In this advertisement, the dominant claim was the benefit of taking Anacin and having it start to work on your headache in twenty-two seconds (Ross, Tr. 1947).

154. Frame 2 of CX 1A, which states "[w]hile you won't feel it for minutes," contradicts the remainder of the advertisement and would not have been perceived or understood by consumers as restricting or qualifying their understanding that the representation alleged in Paragraph 8(A)(4) was made (Ross, Tr. 1943–49). This type of qualification would be overlooked because it is found at the very beginning of the **[55]**advertisement, before its importance could become apparent. Moreover, qualifications on this order (*i.e.*, qualifications inconsistent with the dominant claim) are not perceived by consumers to the same extent as the dominant advertising claim is perceived; consequently, such qualifications are forgotten more quickly than the dominant claim (Ross, Tr. 1946, 1948–49, 1960, 1961–66). This qualification does not even appear in the print advertisements in which this representation is alleged to have been made (CX 142–44, 151 and 153; Ross, Tr. 1950).

155. The phrases "after Anacin is in your bloodstream," or "after entering your bloodstream," (See, *e.g.*, F. 150, *supra*) would not have been understood by consumers as restricting or qualifying their understanding that the representation alleged in Paragraph 8(A)(4) was made because it draws a distinction between presence in the bloodstream and relief from headache pain that would not have been perceived by consumers (Ross, Tr. 1945, 1948–49).

8. *Complaint Paragraph 15*

156. American Home represented that a recommended dose of Anacin relieves nervousness, tension, stress, fatigue and depression and will enable persons to cope with the ordinary stresses of

everyday life (Comp. ¶ 15). This representation was made in the following Anacin advertisements: CX 3, 5–8, 10, 15–18, 20–22, 25, 26, 28, 30–32, 34, 36, 38–49, 81–87, 89, 90, 92–97, 99, 100, 102–04, 115–17, 119, 121–24, 126–37, 142–44, 146–49, 151–56, 160, 162–63, 165–67, 169–72, 174–79 and 181.

157. The fact that Anacin advertisements made this representation is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 156, *supra*; Ross, Tr. 1951–54, 1969–70, 1979, 1980, 1988–89, 1992–93, 1995, 2001, 2002, 2004–09). Confirmatory evidence is contained in reports of the following ASI Audience Reaction Tests: CX 402, 404–07, 409–12, 414, 415 and 418 through 424 (Ross, Tr. 1951–52, 1954–58, 1960, 1970–84, 1989–99, 2002–04, 2681, 2682. See also CX 404E).

158. This representation was made through a variety of express and implied statements, and through the use of suggestive audio and visual techniques creating an imagery indicative of Anacin performing a mood function or having [**56**]mood effects, such as those set forth in Paragraph 15, wholly apart from Anacin's efficacy as a headache or pain reliever.

159. A number of the challenged advertisements placed extra emphasis upon such words as "tension," "anxiety," "nerves," "stress," "fatigue" and "depression" (See, *e.g.*, CX 3, 5, 7A, 8A, 15A, 17A, 21A, 25A, 26A, 27A, 39A, 40A, 44A, 46A, 89, 115 and 155). For example:

(a) Anacin relaxes the tension as it relieves pain. (CX 6A through CX 8A).

(b) Nerves, stress, headache pain . . . . Anacin has what it takes to relieve headache pain and its tension. (CX 26A).

(c) When Boredom and Emotional Fatigue Bring on "Housewife Headache" . . . . Making beds, getting meals, acting as family chauffeur—having to do the same dull, tiresome work day after day—is a mild form of torture. These boring yet necessary tasks can bring on nervous tension, fatigue, and what is now known as "housewife headache" . . . . See if you don't feel better all over with a brighter outlook after taking 2 Anacin tablets. (CX 89 and CX 93. See also CX 90–92, 94 and 95 for similar language).

(d) TURNS OFF HEADACHE PAIN SO RELIEVES PAIN'S TENSION [,] HELPS LIFT ITS DEPRESSION . . . . You feel great again after taking Anacin. (CX 115 through CX 117).

(e) Calms Anxiety [,] Tension as it relieves headache pain . . . . Anacin . . . contains a specific ingredient that relieves pain and its anxiety . . . fast. You feel relaxed. You calm down. Then Anacin keeps exerting its soothing effect for hours. Keeps you feeling great. (CX 155).

160. Many of the challenged advertisements not only emphasize words such as those listed in F. 159, *supra*, but also depict a variety of situational tensions (tensed or stressed circumstances). In these advertisements, the verbal content of a message (showing tension

associated with pain) is pushed into the background through the effective use of aural-visual techniques (*i.e.*, sound effects, music, camera) which create a vivid imagery of situational [57]tension, wholly apart from headache pain, that is relieved by Anacin. For example:

(a) CX 8A shows a ladder knocking a lamp, a screen ripping and a man going about his home doing assorted household chores while mumbling, "One day off . . . . I gotta change the screen . . . paint the woodwork . . . fix the roof [, . . . c]lean the basement . . . ." The man's face visibly depicts a stressful situation. The announcer states in a voice-over, "Pain, headache pain. Its tension drains everything out of you. Reach for help. Reach for Anacin. Anacin relaxes the tension as it relieves pain." After taking Anacin, the man is visibly relaxed and relieved from the stresses of what is part of ordinary, everyday life. He states, "Mmmm, good as new."

(b) CX 22A shows a woman running who drops all of her books and papers. She is depicted as visibly agitated prior to entering a room where she begins her work. The announcer states in a voice-over, "You're under pressure. It piles up . . . . Pain. It's tension. You reach for Anacin." After taking Anacin, the woman appears relaxed and smiling at her desk.

(c) CX 31A shows a bank teller at work on payday, with a long line of customers at his window. The announcer states in a voice-over, "Payday, a good day . . . . Unless you're on the receiving end with headache pain and the tension that goes with it. Discover what Anacin can do to help." After taking Anacin, the bank teller is shown in a visibly calm mood with a smile on his face, while still at work.

(d) CX 40A depicts a woman holding the side of her head with an expression of anguish on her face. There is the noise of a saw, shown initially being operated by her husband, in the background. The woman states, "No headache is going to make me shout at my husband." After taking Anacin, [58]the woman appears smiling and cheerful. She says to her husband, "Anacin did it again." (See, *e.g.*, CX 41A showing motorcycle noise, CX 42A showing the noise of a teenager on the telephone, CX 43A, CX 44A showing the noise of young children at a birthday party, CX 45A showing the noise of banging pots and pans and CX 47A showing the noise of a busy airport. Each of those advertisements creates a similar imagery of situational tension).

(e) "WOMAN: Big parties scare the wits out of me. All those people. I never know what to say. And my husband doesn't help; the

jokes he comes out with. Makes me so tense and nervous, it's awful. I'm upset enough as it is with things at home. Why can't Mom let us bring up our own children, for instance . . . . ANNCR: Headache pain . . . tension . . . depression . . . . that's when you need Anacin." (CX 170).

(f) "HE: You say you've been getting these headaches for no reason at all. SHE: Seems like it, I just go about my housework—you know—cleaning, and shopping . . . and . . . well . . . . HE: . . . picking up after the kids . . . . SHE: Uh, huh, all the regular day in and day out stuff. SHE: Tired? Well, not physically tired so much, but . . . well . . . I cry a lot . . . HE: Emotionally then? SHE: (SIGH) Yes, I guess I'd have to admit to that. Doing all those jobs isn't exactly the most satisfying work I've ever done—as an individual I mean . . . . ANNCR: There you have the anatomy of Housewife Headache. A seemingly endless cycle of boredom and fatigue. One approach . . . is to rely on Anacin." (CX 171).

161. Challenged advertisements such as those cited (F. 156, *supra*) made the representations alleged in Paragraph 15 because they used words or phrases, or presented a setting and environment, which created an imagery of a mood function or mood effects. Taking each advertisement as a total communication, consumers would have understood them as representing that Anacin performed a mood function or had mood [**59**]effects, such as relaxing or relieving tension, quelling stress or resulting in tranquility and calm, wholly apart from its efficacy with respect to relieving headache pain (Ross, Tr. 1952–58, 1967–71, 1972–77, 1981–84, 1989, 1991–95, 2002, 2005–06, 2681–82).

162. In certain of these advertisements, the dominant theme or benefit represented for Anacin was mood effects and not relief from headache pain (Ross, Tr. 1969–70, 1973, 1975, 1981–83, 1992, 1995, 2005–09). For example, stress and tension are frequently emphasized over pain in terms of the amount of advertising space. Also, the advertisements often present a forceful image such as by depicting the individual in the advertisement as tension-free after having taken Anacin (Smith, Tr. 7628, 7631).

163. Certain of the challenged advertisements represent that Anacin can relieve the tension attributable to a tense or unhappy situation (some advertisements present problematic situations, fraught with tension and stress, such as problems with a job, children, housework, etc.). Since substantial numbers of consumers are expected to desire mood effects, such as tension relief, they become less likely to perceive or accept any qualification of a

dominant advertising representation of mood effects than would otherwise be the case (Ross, Tr. 1967–68, 1973).

164. The presentational techniques utilized in a number of the challenged advertisements would have contributed to consumers' understanding that Anacin would perform a mood function or would have mood effects wholly apart from its efficacy with respect to relieving headache pain (Ross, Tr. 1968–70, 1979–80, 1987–88, 1994, 2002–04).

165. The effectiveness of such techniques was well recognized. American Home itself concluded, based on its review of certain ASI tests, that the following factors, among others, typified the most successful Anacin advertisement: "a 'set-up' in the beginning of the commercial which creates a feeling of tension/anguish/pain via a combination of devices which . . . all support the creation of a mood" through the use of sound and inanimate objects or visual effects such as blocks crumbling, and where "[t]he Anacin 'pay-off' was supported by the diminution or complete elimination of the visual or sound effects accompanying the disappearance of the symptoms, in the sufferer's behavior." (CX 329). **[60]**

166. Respondents' expert witness, Dr. Smith, testified that one of the major components in the evaluation of advertisements is the symbolic, implicit or covert meanings that are carried within the messages. He stated that such meanings may be conveyed through the use of color, environment and other visual and/or audio techniques (Smith, Tr. 5556–57).

167. Dr. Smith also observed that the entire content of an advertisement must be taken into account in determining how consumers would understand it. He agreed that both express and implied claims in an advertisement should be given equal weight, since they make up the entire communication. Dr. Smith conceded, however, that much of his testimony focused primarily on the specific language contained in the advertisements (*i.e.*, the audio portion) (Smith, Tr. 7493–94).

168. The following are examples of advertisements in which presentational techniques conveying situational tension contribute to making the challenged representation:

(a) CX 5 begins by showing a person with stress and fatigue, and presents situational tension which is further dramatized by distressing audio effects such as the demanding voices of children. There is a strong visual component in CX 5 depicting fatigue, stress and nervousness building up to the breaking point, which is symbolized by children's blocks lettered F, S and N. This advertisement shows

that, after taking Anacin, calm is restored, the stressful situation relaxed and the fatigue relieved. The major video and audio portion of CX 5 emphasizes tension and stress, rather than pain (Smith, Tr. 7615–16, 7619). Dr. Smith conceded that, based on his model for interpreting advertising, CX 5 could represent to at least some consumers that Anacin can relieve not only headache pain, but also the tension that caused it. He further testified that if consumers understood CX 5 as representing that Anacin can relieve the tension that can cause headaches, they could understand the advertisement as representing that Anacin can relieve all tension (Smith, Tr. 7621–22).

(b) The first seven frames of CX 7A present situational tension, and would convey to consumers those ideas associated with being **[61]**uptight, tense and under stress. This advertisement has a strong visual component, a tightening rope approaching the breaking point, which specifically focuses on tension and nerves rather than pain. The situational tension, headache and additional tension attributable to the headache are all shown as being relieved by Anacin in this advertisement (Smith, Tr. 5848–50, 7622–23).

(c) The larger, bold-faced type in the title of a print advertisement, such as in CX 155, is more likely to be perceived than smaller type in the title or the body of an advertisement. The major thrust in the title of CX 155 is that Anacin calms anxiety and tension; the remainder of the title is subordinate to this anxiety and tension claim (Smith, Tr. 7627–28).

169. The challenged Anacin advertisements present tension in so many different contexts relative to headache pain that any relationship between the two would be unlikely to be understood by consumers. Thus, consumers could reasonably be expected to perceive tension and pain as distinct symptoms which can be alleviated by Anacin regardless of whether they occur simultaneously or independently of each other (See, *e.g.*, Ross, Tr. 1969–79, 2006; Smith, Tr. 7632).

170. The verbatim comments in certain of the ASI Audience Reaction Tests provide confirmatory evidence that a tension relief claim was made (F. 157, *supra*). Dr. Smith, respondents' expert witness, admitted that, based on his own recodification of the ASI verbatims (RX 124), the comments in the tension category make no link between tension and pain or headache, and are directly supportive of this complaint allegation (Smith, Tr. 7633–35). Dr. Smith's figures tend towards the conservative side because the stringent standards he applied resulted in the exclusion of relevant,

or possibly relevant, tension responses. Therefore, even under Dr. Smith's standard, the tension relief claim was communicated, or had consequence, in certain of the challenged advertisements (Smith, Tr. 5592–93).

D. *The Specific Allegations Relating To Arthritis Pain Formula Advertising*

1. *Complaint Paragraph 8(B)(1)*

171. American Home and Clyne have represented that APF's analgesic ingredient is unusual, special, and stronger than **[62]** aspirin (Comp. ¶ 8(B)(1)). This representation was made in the following APF advertisements: CX 201–07, 210, 217 and 218.

172. The fact that APF advertisements made this representation is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 171, *supra*; Ross, Tr. 2303–05). There is no consumer research relevant to this issue.

173. In certain of these advertisements, the analgesic ingredient in APF was specifically contrasted with aspirin. For example:

(a) I'm on something different . . . . Arthritis Pain Formula . . . . 50% more pain reliever than a regular aspirin. So strong you don't need it so often. (CX 201A).

(b) Now you can take a different tablet. Arthritis Pain Formula . . . . Compared to regular aspirin tablets Arthritis Pain Formula contains 50% more of this medication that doctors recommend most. (CX 206A).

(c) Special compound with 50% more pain relief medication than regular or buffered aspirin. (CX 210A).

174. In all of these advertisements, prominence is given to the name of the product and, in certain of them, additional representations are made about its formulation. For example:

(a) The special compound . . . . (CX 210A).

(b) This special pain-relieving compound . . . . (CX 217 and CX 218).

175. Challenged advertisements such as those cited (F.171, *supra*) made the representation alleged in Paragraph 8(B)(1) because consumers would have understood them as representing that APF was qualitatively different from aspirin. This understanding would have arisen out of the implicit claims that either APF did not contain aspirin or, if it did contain aspirin, its principal active pain relieving ingredient was something other than aspirin (Ross, Tr. 2303–05). Consumers would have understood this representation as being made where the analgesic ingredient in APF was specifically contrasted with aspirin. **[63]**

176. Consumers also would have understood the name of the

product, Arthritis Pain Formula, which was prominently embodied in the challenged advertisements, as making this representation, especially where additional representations were made about the formulation of APF (Ross, Tr. 2304–05).

177. Finally, in CX 201, 217 and CX 218, the dominant theme was the strength or strong performance of APF (Ross, Tr. 2305). Respondents' expert, Dr. Smith, agreed that certain challenged APF advertisements would have conveyed the message to arthritis patients that APF was a stronger medicine than plain aspirin (Smith, Tr. 5938).

2. *Complaint Paragraph 8(B)(2)*

178. American Home and Clyne are alleged to have represented that APF will eliminate all pain, stiffness and discomfort usually experienced by arthritis sufferers in the morning (Comp. ¶ 8(B)(2)). This representation was not made in any of the challenged advertisements, which include CX 201 through CX 205.

179. The fact that APF advertisements did not make this representation is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 178, *supra;* Smith, Tr. 5928–30, 7642–44). There is no consumer research relevant to this issue.

180. No APF advertisement has expressly or impliedly claimed that the product will completely relieve pain and stiffness in the morning, nor have consumers understood the advertisements to have made such a claim. The phrase, "get moving without all that pain or its morning stiffness," would be interpreted by consumers as an idiomatic expression conveying the meaning "without as much pain and stiffness as you would otherwise suffer." Arthritis sufferers, at whom these advertisements were directed, are experienced in the pain and stiffness of arthritis and would not interpret any of the challenged advertisements as promising total and absolute relief from the pain and stiffness of arthritis (Smith, Tr. 5928–30, 7642–44; CX 201 and CX 202).

3. *Complaint Paragraph 12(B)*

181. American Home and Clyne have represented that APF will cause gastric discomfort less frequently than any other non-prescription internal analgesic (Comp. ¶ 12(B)). This representation was made in the following APF advertisements: CX 203 through CX 206. **[64]**

182. The fact that APF advertisements made this representation

is demonstrated by the advertisements themselves and confirmed by expert testimony (Advertisements listed in F. 181, *supra;* Ross, Tr. 2307–08).

183. This representation was made through express and implied statements to the effect that APF would cause less stomach disorders or less stomach upset than any other non-prescription internal analgesic. For example:

(a) 50% more pain reliever than regular aspirin tablets . . . . And double buffering to be gentle on the stomach. (CX 203A).

(b) . . . Arthritis Pain Formula contains 50% more of this medication that doctors recommend most. And double buffering makes it gentle on your stomach. (CX 205A and CX 206A. See also CX 204A for similar language).

184. Challenged advertisements such as those cited (F. 181, *supra*) made the representation alleged in Paragraph 12(B) because consumers would have understood advertising that represented that APF had double buffering to mean that APF was more buffered than the product which is otherwise the most buffered in the product category and, therefore, that APF would cause less stomach disorders or less stomach upset than any other non-prescription internal analgesic (Ross, Tr. 2306–08).

185. Many consumers, such as arthritis sufferers, perceive that buffered products are gentler to the stomach than unbuffered products. Therefore, the challenged advertisements which represent that APF has double buffering also carry with them the representation that APF is gentler to the stomach than regular, unbuffered aspirin (Smith, Tr. 7645). Thus, the claim is one of uniqueness in this respect.

4. *Complaint Paragraph 10(B)*

186. American Home and Clyne have represented that it has been established that APF will cause gastric discomfort less frequently than any other non-prescription internal analgesic (Comp. ¶ 10(B)). This representation was made in the following APF advertisement: CX 204. **[65]**

187. The fact that CX 204 made this representation is demonstrated by the advertisement itself and confirmed by expert testimony (CX 204; Ross, Tr. 2309–10).

188. This representation was made in CX 204A through express and implied statements to the effect that the representation that APF would cause less stomach disorders or less stomach upset than any other non-prescription internal analgesic was based on scientific or medical fact or opinion. The advertisement stated that ". . .

Arthritis Pain Formula Tablets contain . . . 50% more of this medication that doctors choose most for arthritis. Another thing: double buffering makes it gentle on the stomach." The following titles were superimposed on the screen: "the Doctors Choice" and "Double Buffering." (CX 204A).

189. CX 204A made the representation alleged in Paragraph 10(B) because consumers would have understood the advertisement as representing that scientific or medical fact or opinion had established that APF would cause less stomach disorder or less stomach upset than any other non-prescription internal analgesic (Ross, Tr. 2309–10).

IV. The Medical And Scientific Substantiation For The Claims Made In The Advertisements

A. *Introduction*

190. The complaint does not charge that American Home lacked a reasonable basis for comparative efficacy or freedom from side effects claims (F. 15, *supra*). Nonetheless, respondents introduced limited evidence attempting to demonstrate that they possessed substantiation in the form of a reasonable basis for claims that were imputed to their advertising (Complaint Counsel's Admissions, RX 244Z027. See also Shaul, Tr. 3279–85, 3296–3309, 3340, 3358, 3382, 3398).

191. The substantiation put forth by respondents for any claims made consisted, *inter alia,* of: (1) expert opinions rendered by preeminent clinicians and pharmacologists who were experts in the area of analgesic evaluation; (2) results of numerous clinical investigations that were performed on aspirin and aspirin-containing products; (3) medical articles and books which are accepted as authoritative treatises in the area of analgesia and pharmacology; and (4) the review of the so-called Peer Review Group commissioned by American Home to evaluate the medical and scientific research and literature regarding the safety and efficacy of Anacin and APF. The evidence adduced by American Home with regard to **[66]**the Peer Review Group warrants the conclusion that respondents had some rational basis for comparative efficacy and freedom from side effects claims for Anacin and APF.

B. *It Has Not Been Established That Anacin Is A More Effective Pain Reliever Than Aspirin Or Any Other Non-Prescription Pain Reliever*

1. *General Background*

192. A recommended dose of Anacin is one or two tablets, for a two-tablet total of 800 mg. aspirin and 65 mg. caffeine (F. 11, *supra*). A comparable two tablet dose of common 5 grain aspirin contains 650 mg. aspirin (F. 13, *supra*). Thus, one tablet of Anacin differs from one tablet of common 5 grain aspirin by 75 mg. more aspirin and the addition of 32.5 mg. caffeine; the two tablet dose differs by 150 mg. more aspirin and 65 mg. caffeine.

193. Anacin does not contain more than twice as much of its analgesic ingredient as all other analgesic products on the market (Non-Contested Issue of Fact 12).

194. There are other analgesic products on the market which contain as much or more pain relieving ingredients per tablet than does Anacin (Non-Contested Issue of Fact 11). Anacin contains at least 23% more aspirin than Bayer Aspirin, Bufferin, Excedrin, Empirin, Norwich Aspirin and all other brands and generic forms of regular aspirin. Four commonly available products, Arthritis Pain Formula, Arthritis Strength Bufferin, Cope and Midol contain more aspirin than Anacin (Forrest, Tr. 477).

195. In order to establish a scientific or medical proposition, the truth of the proposition must either be generally recognized as self evident by experts in the field or proved by evidence which reduces the chance of error to a scientifically acceptable minimum (Azarnoff, Tr. 600; Moertel, Tr. 1028; DeKornfeld, Tr. 2777).

196. The only record evidence which purports to demonstrate Anacin's superiority to common 5 grain aspirin as a pain reliever falls into three categories:

(a) evidence purporting to demonstrate the existence of an ascending dose response curve for aspirin above 650 mg. and, thereby, the superiority of a two tablet [67]dose of Anacin, which contains 150 mg. more aspirin than a two tablet dose of 5 grain aspirin;

(b) evidence purporting to demonstrate the analgesic benefit of caffeine; and

(c) the results of two clinical tests conducted for American Home by Dr. Gilbert McMahon, and reported in RX 31.

This evidence fails to establish Anacin's analgesic superiority over common 5 grain aspirin.

2. *Two Well-Controlled Clinical Studies Are Necessary To Establish The Comparative Efficacy Or Safety Of Analgesic Products*

197. The best type of evidence for the purpose of establishing the comparative efficacy of OTC analgesics is well-controlled clinical testing, *i.e.,* rigorously regulated observation and analysis of pain and pain relief in real patients, suffering real pain, treated in a clinical setting (Forrest, Tr. 447, 472–73; Azarnoff, Tr. 601; Moertel, Tr. 942–43; DeKornfeld, Tr. 2778; Lasagna, Tr. 4177; CX 367Z074).

198. Due to the inherent nature of pain, clinical studies establishing the comparative efficacy of OTC analgesics employ a subjective response methodology, *i.e.,* an approach based on the subject's own report of the pain experienced and the degree of relief obtained after administration of the test drug (Forrest, Tr. 422, 443, 485–87, 560–70; Moertel, Tr. 945, 946; Lasagna, Tr. 4123; CX 367Z007, Z074).

199. Since at least the early 1950's, the medical and scientific community has required well-controlled clinical studies to establish absolute or comparative analgesic efficacy (Moertel, Tr. 1021–25; Rickels, Tr. 1228–29; DeKornfeld, Tr. 2785–86, 2827; Wallenstein, Tr. 3490; Lasagna, Tr. 4119).

200. Two or more independently conducted, well-controlled clinical studies are required to establish the comparative efficacy of OTC analgesics for the relief of mild to moderate pain. The tests should conform in design, execution and analysis to generally recognized standards and criteria for clinical studies (Forrest, Tr. 449–50; Azarnoff, Tr. 601, [68]609–10; Moertel, Tr. 942, 956–57; DeKornfeld, Tr. 2778, 2780–81; Lasagna, Tr. 4142–44, 4178; CX 367Z001, Z074–Z075). These fundamental principles for testing the comparative efficacy of OTC analgesics have been recognized by the FDA OTC Internal Analgesics Panel (CX 367Z074–Z075; F. 201–17, *infra.* See also CX 367Z001–Z002).

201. A threshold requirement for an adequate and well-controlled clinical study is an independent and unbiased investigator, experienced in both the area of inquiry and the experimental technique to be utilized (Forrest, Tr. 462–63; Moertel, Tr. 943–44; DeKornfeld, Tr. 2778–79). Clinical investigators are susceptible to influence by extraneous factors. While good controls can eliminate or compensate for many of these factors, investigator bias can nonetheless enter into and affect all phases of clinical studies (Moertel, Tr. 943–44; DeKornfeld, Tr. 2778–79; Lasagna, Tr. 4142).

202. The nurse or other person employed as the "observer," administering treatments and recording subjects' responses, must also be trained and experienced in order to prevent error or bias from entering into the study (Forrest, Tr. 462; Moertel, Tr. 951; DeKornfeld, Tr. 2784; Lasagna, Tr. 4125).

203. The development of a written protocol prior to commence-

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ment of the study is an essential aspect of a well-controlled clinical investigation. An acceptable written protocol should set out in detail, among other things, the purpose of the study, the type of patients to be studied, the treatments and dosages to be administered, the parameters to be evaluated and the analytic techniques, including the statistical analysis, to be employed in evaluating the results (Azarnoff, Tr. 604–05, 608–09; Moertel, Tr. 947–48; DeKornfeld, Tr. 2778; Lasagna, Tr. 4124). By adhering to a protocol set out in advance, the investigator protects against biases which might develop and otherwise influence the course of the study's execution or analysis, *e.g.*, by later "peeking" at and/or "massaging" the data (Azarnoff, Tr. 604, 643; Moertel, Tr. 952; DeKornfeld, Tr. 2783; Lasagna, Tr. 4858–59). A written protocol facilitates any subsequent peer review of the study and judgment as to its reliability.

204. To establish the comparative efficacy of OTC analgesics for a particular type of pain, such as headache pain, at least one of the required two clinical studies must employ an appropriate pain model. That is, the pain selected for testing must respond to analgesic medication in a manner similar to that for which the analgesic is ultimately intended (Forrest, Tr. 443–44, 447–49; Azarnoff, **[69]**Tr. 610–11; DeKornfeld, Tr. 2778–80; Lasagna, Tr. 4144–45). The best pain model is that type of pain for which the drug is to be used, *e.g.*, for which a claim of efficacy may later be made (Forrest, Tr. 447–49; DeKornfeld, Tr. 2780).

205. Clinical studies can be and have been conducted on headache pain. One such study, conducted by Murray, was published in *Clinical Pharmacology and Therapeutics*, Volume 35, No. 1 (1968) (Wallenstein, Tr. 3467; Lasagna, Tr. 4132). Indeed, clinical studies were conducted for American Home on relief from pain due to headache (CX 301 and CX 302). Such studies can be undertaken in a relatively short amount of time; the Murray study, for example, took only 12 weeks (Lasagna, Tr. 4166–67).

206. Other pain models which have been employed in clinical studies of OTC analgesics are post-partum pain (including pain resulting from intra-uterine cramping and episiotomy), cancer pain, post-operative pain and pain due to trauma (See F. 245–55, 279, 286 and 290, *infra*). Intra-uterine cramping pain results from spasms due to continued contractions of the uterus, sometimes for several days, after a woman has given birth (Kantor, Tr. 3554). Episiotomy pain results from a surgical incision in the wall of the vulva which allows the birth canal to open slightly wider, thereby facilitating the birth; the incision is sutured after the birth (Kantor, Tr. 3555).

207. An appropriate number of patients should be used to study

each treatment administered in the study. For clinical studies of OTC analgesics, each treatment group should contain between 30 and 60 subjects (Forrest, Tr. 444; DeKornfeld, Tr. 2781–82; Kantor, Tr. 3554; Okun, Tr. 4499; CX 367Z074).

208. The subject population must be randomly distributed among the treatment groups. Randomization balances out variables and potential biases not otherwise controlled for in the study (Forrest, Tr. 444; Azarnoff, Tr. 601; Wallenstein, Tr. 3488; Lasagna, Tr. 4123; CX 367Z074).

209. Furthermore, in a single dose study, where each patient receives only one of the test treatments, the subject population should be stratified as to important variables (*e.g.*, degree of pain), and then be randomly distributed. Such a procedure assures that these variables will fall equally into all treatment groups (Moertel, Tr. 949–50; Azarnoff, Tr. 602). **[70]**

210. In working with OTC analgesics, where products are well known and readily identifiable by their shape, color or other distinctive attribute, the pain relief obtained can be dramatically affected by pre-existing biases or expectations toward the products on the part of the subjects, investigator, observer or others involved in the execution of the study (DeKornfeld, Tr. 2782). Those conducting the study can communicate their biases to the subjects, as well as be influenced themselves in the execution and evaluation of their work. Differences in taste, shape and form, regardless of whether a product's identity is perceived, can differentially affect placebo responses, *i.e.*, generate a greater or lesser degree of relief based on expectations alone, apart from the pharmacologic activity or inactivity of the drug.

211. To eliminate this major source of bias, the clinical study must be double-blinded. Neither the subject nor those conducting the study should be able to identify the test drugs. All treatments should be made to appear identical in every respect, and the actual identity of the treatments must remain undisclosed to those conducting the study until after preliminary analysis of the data is completed. With the exception of circumstances where single blinding (*i.e.*, blinding only the subject) is ethically necessary, double-blinding is a prerequisite of a well-controlled clinical study (Forrest, Tr. 444, 457, 458; Moertel, Tr. 948; DeKornfeld, Tr. 2778, 2782; Wallenstein, Tr. 3488; Lasagna, Tr. 4123, 4126, 4128).

212. In most instances, a well-controlled clinical study should include a placebo control. This is the customary practice in two-drug comparison studies. The placebo, a pharmacologically inactive

treatment, acts as a built-in measure of the sensitivity of the study (Forrest, Tr. 459–61).

213. In clinical studies of mild to moderate pain, the placebo response rate, *i.e.*, the rate of positive responses (perceived relief) in the presence of a pharmacologically inactive drug, is commonly between 30% and 60% (Forrest, Tr. 496; Lasagna, Tr. 4133). A study done by Murray on headache pain patients showed a placebo response rate of 57%, while a headache study done by Jellinek showed a placebo response rate of 52% (Lasagna, Tr. 4131–32).

214. The ability of a clinical study to differentiate between a placebo and a known active drug, such as aspirin, by showing a higher response rate for the latter, is a direct measure of test sensitivity since the effect of [71]the placebo is often to mimic the effect of the drug under study (Forrest, Tr. 444, 446, 460–61; Azarnoff, Tr. 605–06; Moertel, Tr. 950; DeKornfeld, Tr. 2785; Lasagna, Tr. 4134).

215. A placebo also controls for spontaneous changes in the course of the subject's pain experience, *e.g.*, where pain is self-limiting and would be relieved regardless of a drug's pharmacologic activity (Lasagna, Tr. 4128, 4130).

216. In order to be accepted as showing a difference among drugs tested in a study, the results must demonstrate that the differences observed are statistically significant at the 95% level of confidence. That is, the likelihood that the results obtained were due to chance cannot be greater than 5% (Forrest, Tr. 456; Azarnoff, Tr. 608; Moertel, Tr. 954–55; DeKornfeld, Tr. 2784; Lasagna, Tr. 4136–37; Okun, Tr. 4420).

217. Subjecting a clinical study to peer review, which occurs when a study is submitted for publication in a reputable journal, adds an extra guarantee of reliability to the study (Forrest, Tr. 463; Moertel, Tr. 956).

218. The individual consumer of OTC analgesics can perceive and report pain and the degree of relief obtained from pain. This ability forms the basis of the subjective response methodology that is employed in the clinical studies of OTC analgesics and other drugs (Forrest, Tr. 485–87). However, when a consumer of OTC analgesics experiences pain relief in the uncontrolled environment of daily life, he is unable to distinguish the pharmacologic contribution, if any, of the OTC analgesic from a host of other factors (Forrest, Tr. 501; Azarnoff, Tr. 626, 655; Moertel, Tr. 943, 947; DeKornfeld, Tr. 2794–97). He cannot, for example, differentiate a true pharmacologic response from a response due to the suggestion and expectation surrounding the taking of a drug, *i.e.*, a placebo response (Azarnoff,

Tr. 626, 655; Moertel, Tr. 942; F. 214, *supra*). The consumer cannot determine whether pain relief in a given instance has occurred spontaneously or as a result of medication. Mild to moderate pain, such as headache pain, is self-limiting, eventually disappearing if left to itself (Moertel, Tr. 942; DeKornfeld, Tr. 2795; CX 367I).

219. Furthermore, the consumer lacks reliable means for comparing his experiences with the same or different OTC analgesics. In addition to the problem of memory, the consumer has no way of accounting for differences in the intensity of pain each time he has sought relief from an analgesic (Azarnoff, Tr. 626, 655). **[72]**

220. A large number of substances which enjoyed wide consumer acceptance as effective remedies have been shown in clinical studies to be totally ineffective and have been removed from the market (DeKornfeld, Tr. 2797). Dr. Lasagna demonstrated that, even on a blinded basis, individual consumers are unable to distinguish the comparative therapeutic effect of five OTC analgesics (Lasagna, Tr. 4185).

221. Measurements of absolute and comparative analgesic efficacy in animals have failed to predict with any degree of consistency the performance of analgesics in man (Forrest, Tr. 447–49; Azarnoff, Tr. 646; Okun, Tr. 4462; CX 367Z074). The ultimate conclusion as to the analgesic efficacy of a drug must be based on clinical tests conducted on humans, not animals (McMahon, Tr. 3992).

222. No correlation has as yet been established between the amount of analgesic in the bloodstream and the degree of pain relief. Thus, blood level studies are not an accepted basis for predicting comparative analgesia (Forrest, Tr. 449, 556; Azarnoff, Tr. 617, 620–21; Moertel, Tr. 958; DeKornfeld, Tr. 2786–87; Okun, Tr. 4325, 4329, 4424; CX 367 O, Z004, Z007).

223. The clinical experience of doctors with their individual patients is not a sufficient basis upon which to make a determination of the absolute or comparative efficacy of mild analgesics in the general population (DeKornfeld, Tr. 2797) because an individual (doctor or patient) cannot evaluate various mild analgesics on an unblinded basis and make a scientifically sound determination about comparative pharmacological efficacy (DeKornfeld, Tr. 2794–96; F. 218 and 219).

224. Tests employing experimental pain models (pain that is artificially induced in humans) have proven poor predictors of the clinical performance of analgesics in humans (Lasagna, Tr. 4144–45; Okun, Tr. 4461–62; CX 367Z074).

225. Thus, consumers cannot evaluate for themselves the actual pharmacologic efficacy or comparative efficacy of OTC analgesics.

Attempts to measure absolute and comparative efficacy of mild analgesics other than by well-controlled clinical trials have not been shown sufficiently reliable to establish absolute or comparative efficacy in man.

3. *The Dose-Response Curve*

226. The dose-response curve for a drug is a graphic expression of the anticipated relationship between the size of **[73]**the drug dosage and the degree of therapeutic response based on tests of two or more graded doses of the drug. The classic dose-response curve for most active drugs is positive; that is, as you increase the dosage you get an increase in the therapeutic effect until the curve reaches a plateau, beyond which no additional benefit is obtained by increasing the dosage (Forrest, Tr. 556–57; Kantor, Tr. 3561; Lasagna, Tr. 4102: Okun, Tr. 4317–18).

227. The dose-response curve is plotted as follows: clinical studies relating graded doses of aspirin to degrees of pain relief obtained generate a series of data for each dosage tested; by averaging the results of the observations for each dosage tested, a mean is obtained; the mean results for the graded doses are then plotted on a graph (usually with dosage on the horizontal axis, and change in pain intensity on the vertical axis); and, finally, a line connecting the data points (mean results) is mathematically drawn (Okun, Tr. 4489–91, 4519–20; Lasagna, Tr. 4953).

228. Since the points actually plotted on the curve are means, there will be individuals who fall above the mean (more pain relief than the average) as well as individuals who fall below the mean (less pain relief than the average) at each data point (Lasagna, Tr. 4953–55). The spread of the cluster of observations around each data point representing a dosage level (compact or sloppy) affects the significance that can be attached to the mean; the more scattered the actual observation points in relation to each mean are, the less reliable the dose-response curve becomes (Okun, Tr. 4492–93, 4497–98).

229. The dose-response curve is generally accepted by clinical pharmacologists as a useful statistical tool in guessing the efficacy of a drug dosage in terms of its anticipated potency based on clinical data obtained from actual tests of graded dosages. As such, it is based on extrapolation (Kantor, Tr. 3656; Lasagna, Tr. 4106–07; Okun, Tr. 4323–24, 4339–40, 4495–96. See also Forrest, Tr. 529, 530–36; Azarnoff, Tr. 669–70; DeKornfeld, Tr. 2815–16).

230. The line that is fitted to the mean points, and thus

represents the dose-response curve, is based on inference and assumption since not all points (dosages) along the line are tested. Indeed, respondents' experts, Drs. Kantor, Lasagna and Okun, conceded that a dose-response curve is merely a best estimate of the points being measured and that the belief that unmeasured points will fall along **[74]**such a curve is premised only upon a likelihood, albeit a great one (Kantor, Tr. 3571–72, 3656; Lasagna, Tr. 4271–73; Okun, Tr. 4506–09).

231. The mere fact that a drug (*i.e.*, Anacin) has a greater amount of active ingredient (*i.e.*, aspirin) than another drug (*i.e.*, common 5 grain aspirin) does not necessarily mean that the extra amount of active ingredient provides an extra amount of therapeutic effect. The precise shape of the dose-response curve, including its plateau level and the dosage point where reverse response, if any, begins, must be determined empirically. An extra amount of active ingredient may not be of clinical significance if increasing the dosage produces only very small changes in response before a plateau level is reached (Azarnoff, Tr. 639–42; DeKornfeld Tr. 2804; Kantor, Tr. 3612–13; Lasagna, Tr. 4102, 4246–48; Okun, Tr. 4510–12).

232. The term clinical significance, as used in this proceeding, commonly refers to the practical application of a drug. For example, a drug may be proven safe and effective but may only work for a 15-minute duration, thus destroying its clinical utility. On the other hand, the term "statistical significance," as used in this proceeding, is a scientific term; it refers to the quality and quantity of data deemed essential to establish a fact in medicine (DeKornfeld, Tr. 2825–26). Dr. DeKornfeld stated that if the comparative efficacy of a pharmacologic agent is established to a statistically significant degree, then he would be willing to assume that the drug would be clinically effective providing it had no features rendering it clinically unusable (DeKornfeld, Tr. 2826–27).

233. Respondents' expert, Dr. Okun, admitted that the dose-response curve does not allow one to project statistical significance for points on the line that are not based on actual data readings. Thus, the curve does not serve the function of predicting whether the differences observed on the graph between different dosage levels and the degrees of pain relief obtained are or are not statistically significant (Okun, Tr. 4476, 4493–94).

234. The relationship of increased aspirin dosage to increased analgesia is not linear; rather, the effect is recognized as proportional to the logarithm of the dosage (Azarnoff, Tr. 645; DeKornfeld, Tr. 2804; CX 367T).

235. Whether a suggested difference between two dosage levels of

a drug is or is not statistically significant can only be determined through a clinical trial [75]that actually tests the drug at the two pertinent dosage levels (Okun, Tr. 4476).

236. A substantial portion of the testimony of respondents' expert witnesses addressed the issue of the dose-response curve for aspirin, contending that an ascending curve is established and is scientifically accepted as evidence for the proposition that Anacin is more effective in the relief of pain than a regular dose of aspirin.

237. Dr. Lasagna testified that there is evidence that the additional amount of aspirin contained in Anacin provides increased pain relief compared to 650 mg. aspirin. He stated his belief that there is no substantial question that there is a dose-response curve for aspirin above 650 mg. (Lasagna, Tr. 4107–08).

238. In fact, in Dr. Lasagna's opinion, as the dosage of aspirin is increased, analgesic response will increase at least until the range of approximately 1200 to 1800 mg. is reached. Dr. Lasagna made reference to clinical studies by Dr. Raymond Houde and Mr. Stanley Wallenstein, Drs. Kantor, Parkhouse, McMahon, Murray and Forrest, which purport to demonstrate a statistically significant positive linear slope for the aspirin dose-response curve from which judgments and conclusions based on estimates are made concerning intervening points on the curve (Lasagna, Tr. 4103, 4105–06, 4257, 4262–63, 4265–71, 4276, 4903–05, 4906, 4913–14, 4932–33).

239. According to Mr. Wallenstein, there is no substantial question as to the existence of a dose-response relationship for aspirin given the replication of his findings in many different clinical investigations performed on many types of pain (F. 245, *infra*). In his opinion, the recommended dose of Anacin will afford greater analgesia than 650 mg. aspirin (Wallenstein, Tr. 3466–68, 3470–73, 3476–77).

240. Dr. Kantor testified that a dose-response curve is established for aspirin. He stated there is substantial evidence of the fact that when more aspirin is administered, more pain relief is obtained. In his view, a majority of experts support this proposition, and it is not open to substantial question. In Dr. Kantor's opinion, 800 mg. aspirin would be higher on the dose-response curve than 650 mg. aspirin, and an 800 mg. dose of aspirin would produce more analgesic activity than a 650 mg. dose of aspirin (Kantor, Tr. 3554–66, 3582–83, 3619–20, 3623, 3632–38, 3654–55). Dr. Kantor, therefore, has concluded [76]that two Anacin have more analgesic effect than 650 mg. aspirin (Kantor, Tr. 3568).

241. Dr. Okun testified that the existence of the dose-response relationship for aspirin is established, and that the proposition that

aspirin's analgesic effectiveness increases as the dosage is increased up to at least 1200 mg. is unquestioned. Based on reports of clinical investigations and his own clinical experience, Dr. Okun concluded that, because 800 mg. was within the parameters of the dose-response curve established for aspirin, 800 mg. aspirin is more effective than 650 mg. (Okun, Tr. 4317–25, 4485–86).

242. In Dr. McMahon's opinion, the aspirin dose-response curve reported in the medical literature is established and is consistent with clinical experience. He testified that the positive ascending slope of the curve demonstrated in the various studies establishes that if increased doses of aspirin are administered, increased effectiveness will be achieved through the range from 200 mg. to approximately 1200 to 1800 mg. Therefore, Dr. McMahon concluded that 800 mg. aspirin is more effective than 650 mg. (McMahon, Tr. 3788–90, 3896–98).

243. Despite the opinions of respondents' expert witnesses, numerous clinical studies have been unable to conclusively demonstrate the existence of a positive dose-response curve for aspirin; increased doses of aspirin have not consistently been shown to produce greater analgesia than lower doses (F. 245–55, *infra*).

244. Indeed, graded dose studies on aspirin suggest that, if a curve exists, it is extremely shallow, or nearly flat (Azarnoff, Tr. 639–42; Kantor, Tr. 3563; CX 367T. See also F. 234, *supra*).

245. Mr. Wallenstein testified that his publication, *Analgesic Studies of Aspirin in Cancer Patients* (RX 32), represents a compendium of analgesic studies done over a number of years at the Sloan-Kettering Institute. Portions of this work had previously been published in 1958 by Drs. Houde and Modell in an article, *Factors Influencing Clinical Evaluation of Drugs*, which appeared in the Journal of the American Medical Association. In comparing 400 mg., 600 mg. and 900 mg. aspirin in 14 patients suffering from cancer pain, an ascending dose-response curve with a statistically significant positive slope was demonstrated. The total effect of the aspirin increased in a straight line with the increased log of the dose; this relationship [77]was found to be statistically significant at the 95% confidence level. Statistically significant differences in effectiveness were shown between 600 and 900 mg. in terms of total analgesic effect. However, no statistically significant differences were shown among the dosages in terms of peak effect (Wallenstein, Tr. 3429–40; Lasagna, Tr. 4915–16; RX 32 at 7–8).

246. A 1976 graded dose study on episiotomy pain by Bloomfield, et al., published in *Clinical Pharmacology and Therapeutics* (Volume 20, p. 449), compared 600 mg. aspirin to 1200 mg., a difference in

aspirin amount four times as great as that between two tablets of Anacin and two tablets of 5 grain aspirin. He found no statistically significant difference in pain relief, and attributed this result to a ceiling or plateau effect at 600 mg. (Lasagna, Tr. 4260–61).

247. A 1968 article by Parkhouse, published in *British Journal of Anesthesia* (Volume 40, p. 433), compared dosages of 600 and 1200 mg. aspirin in five studies measuring the relief of post-operative pain. Two of the studies showed no greater pain relief obtained from 1200 mg. than 600 mg.; at no time was a statistically significant difference in pain relief shown in a direct comparison between 600 and 1200 mg. (Lasagna, Tr. 4262–63, 4919–20, 4969–71). Dr. Lasagna noted that in two of the five studies, Parkhouse found a statistically significant slope to a line drawn between points plotting dose-response data for 600 and 1200 mg. (Lasagna, Tr. 4921–24), but admitted that this related only to the manner in which the line was constructed and did not signify a statistically significant difference in response between the two doses (Lasagna, Tr. 4969–71).

248. Dr. Kantor's testimony, concerning the numerous graded dose-response studies he had conducted, revealed that those studies generally failed to show the analgesic superiority of doses larger than 600 mg. (F. 249–55, *infra*).

249. In two graded dosage studies, on intra-uterine and episiotomy pain, each using doses of 600 and 1200 mg. aspirin, the combined data failed to show a dose related effect for aspirin, although in one test the difference between 600 and 1200 mg. in relieving episiotomy pain was shown to be statistically significant for one hourly period (Kantor, Tr. 3578–81).

250. In one study by Kantor on obstetrical pain, 230, 600 and 2000 mg. aspirin were compared, along with Excedrin, using 30 patients per treatment group. The study showed no [78]statistically significant differences in total relief between 600 mg. and 2000 mg. aspirin (Kantor, Tr. 3588–95).

251. In another study on uterine and episiotomy pain, 200, 600 and 1800 mg. aspirin, along with Excedrin, were compared, using 38 patients per treatment group. There were no differences, by any parameter used, between the 600 and 1800 mg. dosages of aspirin (Kantor, Tr. 3596–98).

252. Again, in another study, using post-partum pain, Dr. Kantor compared 300, 600 and 1200 mg. aspirin, along with Excedrin, using 50 patients per treatment group. In the 25 different parameters studied, no statistically significant differences were found between 600 and 1200 mg. aspirin (Kantor, Tr. 3606–07).

253. Dr. Kantor also conducted a study comparing 150, 300, 450,

600, 1200 and 1800 mg. aspirin on combined uterine and episiotomy pain. No statistically significant differences were found between 600 and 1200 mg. aspirin, with only 1800 mg. showing superiority over the lower doses (Kantor, Tr. 3607–09).

254. In yet another study, this time on post-surgical and post-trauma pain, using 30 patients per treatment group, Dr. Kantor compared 600 and 1200 mg. aspirin against a test drug. He found 1200 mg. aspirin less effective than 600 mg., suggesting that if an ascending dose-response curve exists, it may begin to slope downward at some point above 650 mg. aspirin, at least for this type of pain (Kantor, Tr. 3612–13).

255. Finally, in a study on analgesic potency and anti-inflammatory drugs, published in *Arthritis and Rheumatism* (Volume 7, No. 20 (1977)), 300, 600 and 1200 mg. aspirin were compared by Dr. Kantor for relief of post-trauma pain; no statistically significant differences between 600 and 1200 mg. aspirin were found (Kantor, Tr. 3614–16).

256. In sum, the evidence regarding the existence of an ascending dose-response curve for aspirin, above 650 mg., is equivocal. This evidence suggests that, if such a curve does exist, it either is shallow and flat (F. 244, *supra*), or there is a plateau between 650 mg. and 1200 to 1800 mg. The available evidence, including the second study conducted by Dr. McMahon in RX 31, suggests a plateau between 600 and 1200 mg. aspirin for at least one type of pain, *i.e.,* uterine pain (Kantor, Tr. 3596; Lasagna, Tr. 4881). **[79]**

257. Within the dosage ranges where aspirin has been shown to be dose-responsive, a large increase in dosage is usually required in order to obtain a relatively small increase in analgesic response (F. 234 and 244, supra; CX 367T).

258. Nonetheless, based on the record evidence concerning the clinical experience of medical experts and the existence of the dose-response curve, it is reasonable to conclude that some people who fail to achieve pain relief with 650 mg. aspirin could conceivably obtain relief with higher doses (Lasagna, Tr. 4103–05, 4154–58, 4243–44, 4275–76; RX 32; CX 367Z041-Z042).

259. Respondents' expert witnesses agreed that the proposition that a recommended dose of Anacin would fall on the purported dose-response curve at a point statistically significantly different from that of 650 mg. aspirin was a mere inference, although based on sound pharmacological reasoning (Wallenstein, Tr. 3513; Kantor, Tr. 3633, 3642; McMahon, Tr. 3981; Lasagna, Tr. 4899. See also DeKornfeld, Tr. 2817). Given Anacin's small increment of aspirin over common 5 grain aspirin (150 mg. when two tablets of each are

compared), as compared to dosages of 1200 and 1600 mg. aspirin, any claim of Anacin's superior efficacy derives little, if any, support from the available data.

260. Regardless of whether a dose-response curve for aspirin exists, it has not been established that the additional amount of aspirin in a recommended dose of Anacin makes it more effective than a recommended dose of 5 grain aspirin for the relief of mild to moderate pain, the condition for which the drugs are indicated (Azarnoff, Tr. 614; Moertel, Tr. 969–70; DeKornfeld, Tr. 2789–91).

261. A further consideration is that the addition of caffeine to the 800 mg. aspirin in Anacin raises the question of whether Anacin's dose-response curve is the same or similar to that for aspirin. Nothing is known about the dose-response curve of aspirin-caffeine combinations (Lasagna, Tr. 4265). Well-controlled clinical tests would be required to determine where Anacin, as distinguished from 800 mg. aspirin, would fall on such a curve (Wallenstein, Tr. 3514).

262. The record fully supports the proposition that well-controlled clinical trials are required to establish, in a scientific sense, the analgesic superiority of Anacin [80]over common 5 grain aspirin (Forrest, Tr. 465; Wallenstein, Tr. 3513; Kantor, Tr. 3648–49; Lasagna, Tr. 4976–77).

4. *Caffeine*

263. Caffeine is not considered an active ingredient for analgesic purposes (Forrest, Tr. 547). In therapeutics, it is mainly used as an ingredient in analgesic combinations and as an ingredient in certain preparations that are used for the treatment of migraine headaches (Lasagna, Tr. 4097; Okun, Tr. 4359–60). For instance, the FDA OTC Internal Analgesics Panel concluded that caffeine (citrated caffeine) when used alone in an adult oral dosage of 65 mg. not to exceed 600 mg. in 24 hours is safe but ineffective as an OTC analgesic ingredient (CX 367Z112).

264. Caffeine is a member of a class of drugs known as xanthines (Okun, Tr. 4352–53). Caffeine has been described as a central nervous system stimulant that acts on the kidneys to produce increased excretion of urine and on the vascular system to cause a constriction of blood vessels in certain parts of the body, stimulating cardiac response and relaxing smooth muscles. Caffeine acts on the scalp and internal skull within the brain, causing initial constriction of blood vessels at first and eventual dilation of them, thereby enlarging the diameter of the blood vessels so that blood can flow more easily. This mechanism acts to reduce headache pain (Lasagna, Tr. 4097; Okun,

Tr. 4354–56; CX 367Z005). Caffeine is also a known secretagogue (known stimulant in the production of hydrocholoric acid in the stomach) (Shapiro, Tr. 2969).

265. Respondents' witness, Dr. Okun, testified that caffeine tends to liberate within the body certain classes of hormones called catecholamines, which are known to cause analgesia in humans (Okun, Tr. 4358).

266. Dr. Okun stated his belief that, in doses of 50 to 100 mg., caffeine tends to offset aspirin's lethargic reaction by keeping the patient more alert. Caffeine, in usual doses, causes wakefulness and alertness and will alert the patient more to his environment and less to the pain (Okun, Tr. 4352–54). However, another of respondents' witnesses, Dr. Lasagna, stated that caffeine possibly could make an individual more aware of pain (Lasagna, Tr. 4972–73). [81]

267. For the last 50 years, "APF" has been a commonly used analgesic combination. APF tablets normally contain aspirin, phenacetin and approximately 32 mg. caffeine (Complaint Counsel's Admission, RX 244Z017–Z018). There are analgesic products sold by prescription which contain approximately 65 mg. caffeine in recommended doses which are marketed on the basis of FDA approved New Drug Applications (NDA's). In fact, during the period of July through December 1976, the FDA approved NDA's, supplemental NDA's or abbreviated NDA's for at least five analgesic drugs containing, on a per tablet basis, between 30 to 40 mg. caffeine (Complaint Counsel's Admission, RX 244Z016–Z019).

268. There is no evidence in this record to indicate that the addition of caffeine to aspirin would depress, detract or hinder the analgesic effect of Anacin's aspirin content or have any negative effect on aspirin's normal dose-response curve.

269. However, there is also no evidence, in the form of well-controlled clinical tests in humans, demonstrating that caffeine has any positive analgesic effect in combination with aspirin (Kantor, Tr. 3568; Lasagna, Tr. 4222–24; Okun, Tr. 4454–58). Dr. Okun cited studies by Vinegar on animals, which indicated an analgesic effect for caffeine (Okun, Tr. 4357–58, 4359). However, animal studies are unreliable predictors of analgesic efficacy in man and, thus, unacceptable for purposes of establishing the analgesic effect of caffeine (Lasagna, Tr. 4217). Moreover, the popularity of caffeine in combination analgesic products is not a scientific basis for concluding that it has any analgesic effect (Lasagna, Tr. 4215).

270. Testimony by four of respondents' expert witnesses indicated doubt surrounding the usefulness of caffeine in combination with aspirin. Dr. Lasagna conceded that the analgesic effectiveness of

caffeine had not been proven (Lasagna, Tr. 4227). Dr. Kantor stated that he had not yet come to an absolute conclusion on the value of caffeine, but was currently conducting a test on that precise question (Kantor, Tr. 3567–68). Mr. Wallenstein also conceded the need for further study to determine if caffeine adds to the analgesic effect of aspirin (Wallenstein, Tr. 3512). Dr. McMahon testified that he had published an article in 1971 calling for the removal of caffeine from analgesics as worthless (McMahon, Tr. 3985); although he stated that his mind has since changed, he did indicate that he still is uncertain that the addition of caffeine to analgesic products is worthwhile (McMahon, Tr. 3985–88). Furthermore, [82]the FDA OTC Internal Analgesics Panel reported that the combination of aspirin with caffeine requires additional testing to demonstrate efficacy because of insufficient evidence of the effectiveness of this combination as an OTC analgesic product at the present time (CX 367Z001, Z112). Also, *The AMA Drug Evaluation* (CX 362), a highly reliable and recognized text on drug therapy (Forrest, Tr. 488; Azarnoff, Tr. 625; Lewis, Tr. 781–84; Moertel, Tr. 990–91; Shapiro, Tr. 3108), and *The Medical Letter on Drugs and Therapeutics* (CX 363), another highly reputable and reliable source of information on drug safety and efficacy (Forrest, Tr. 487; Azarnoff, Tr. 625; Moertel, Tr. 990; Sliwinski, Tr. 1152; DeKornfeld, Tr. 2771), reported that they found that it had never been established that the addition of caffeine to aspirin resulted in any differential effect on analgesic activity (CX 362X, CX 363B).

271. A clinical investigation demonstrating caffeine's contribution to analgesia was discussed by Mr. Wallenstein. Dr. Houde and Mr. Wallenstein conducted a clinical trial comparing aspirin, caffeine and paracetamol (acetaminophen) in different combinations. The study was designed to determine the effects of one and two tablets of each combination, and the contribution of each of the active ingredients. The results from the one-tablet administration of each drug showed the effects of the combination drugs to be somewhat superior to the effects of either drug alone, but the differences were not statistically significant at the 95% confidence level. However, the results of the two-tablet administration revealed that only the combination drug containing caffeine was better than either drug alone and this difference was statistically significant at the 99% confidence level, indicating that caffeine may have increased or added to the analgesic effect (Wallenstein, Tr. 3460–64).

272. Mr. Wallenstein testified that the results of this study suggest that 60 mg. of caffeine may produce an effect not seen in lower doses in terms of increased analgesic effect, and that Dr.

Houde has written (R. Houde, *Study of Aspirin N-Acetyl-p-Aminophenol and Caffeine Combinations*) that the data from these caffeine studies provide some evidence to show that caffeine contributes to the efficacy of these drugs (Wallenstein, Tr. 3461–64, 3519; RX 32 at 8–9; CX 367Z113–Z114).

273. However, the Wallenstein study did not compare aspirin with and without caffeine, but rather aspirin versus a combination of aspirin, paracetamol (acetaminophen) and caffeine. Mr. Wallenstein never tested caffeine alone in combination with aspirin (Wallenstein, Tr. 3464, 3504). The **[83]**report by Mr. Wallenstein of his study specifically concluded that "the results with caffeine must be considered equivocal" (RX 32). Indeed, Mr. Wallenstein testified that the studies in RX 32 were not proof that caffeine enhances analgesia (Wallenstein, Tr. 3501–02), since, when the two studies including caffeine combinations were combined, any significant increase in effect which might have been attributed to caffeine disappeared (Wallenstein, Tr. 3463).

274. CX 361, a study by Dr. Moertel, entitled *Relief of Pain by Oral Medication—A Controlled Evaluation of Analgesic Combinations,* published in *The Journal of the American Medical Association,* Volume 229 (1974), is the only clinical study which has directly compared aspirin with and without caffeine (Lasagna, Tr. 4220). The combination of aspirin and caffeine was not shown to afford greater pain relief than aspirin alone, and actually performed more poorly although not at a statistically significant level (Moertel, Tr. 965).

275. However, Dr. McMahon, testifying on behalf of respondents, criticized CX 361 as seriously flawed in its methodology. As explained by Dr. McMahon, the methodology utilized was experimental and unproven. Only outpatients were used; hourly observations or interviews by trained personnel were not done; patients recorded the percentage of pain relief without any verification of the accuracy of recordation; patients were instructed not to take medication more than six hours apart, but there was no evidence that this instruction was complied with; and there was an unsupported assumption that patients took medication as scheduled from 10 different envelopes. In Dr. McMahon's opinion, the instruction that patients should compare their pain intensity or degree of relief at the end of the study period with their baseline pain would be an almost impossible task for outpatients to perform accurately (McMahon, Tr. 3994–97).

276. In the absence of well-controlled clinical studies directly comparing aspirin with and without caffeine, caffeine's pharmacological effect as an adjuvant in an analgesic preparation is unknown.

277. The record, as a whole, demonstrates that the effect of caffeine as a potentiator or adjuvant to aspirin has not been established (Forrest, Tr. 474, 475, 521, 522, 524; Azarnoff, Tr. 613; Moertel, Tr. 960; DeKornfeld, Tr. 2789; CX 367Z001, Z112). [84]

278. Therefore, it has not been established that the 65 mg. caffeine contained in a recommended dose of Anacin makes Anacin more effective for the relief of pain than a recommended dose of common 5 grain aspirin.

5. *The McMahon Studies*

279. The McMahon studies (RX 31) denote the report on two clinical studies (referred to here as the first and second McMahon study, respectively) comparing a recommended dose of an Anacin-like formulation, a recommended dose of aspirin and placebo on each of four measurements: pain intensity, pain relief, pain analog and global response (McMahon, Tr. 3711, 3717, 3871).

280. Pain intensity was graded on a numerical scale ranging from zero to four, with zero being no pain and four being very severe pain (only persons with a pain intensity score of at least two, *i.e.*, moderate pain, were selected for study). Pain relief was measured on a numerical scale of zero to four. Evaluations of pain were also made by utilization of pain analog scores, where the patient marked the degree of pain on a line 200 mm. long, going from no pain to the worst pain ever felt. A global impression of pain relief measured by a numerical scale of zero to five was used at the beginning of the study and after the last hourly observation to measure the patient's overall impression of the medication's benefit (McMahon, Tr. 3721–29; RX 28; RX 31).

281. The studies were conducted by Drs. McMahon, Adesh Jain and Jerome Ryan during the period 1974 to 1977. Dr. Jain, Assistant Professor of Medicine in Clinical Pharmacology at Tulane University Medical School, is a specialist in obstetrics and gynecology. Dr. Jerome Ryan, Professor of Medicine and former President of the medical faculty at Tulane Medical School, is a specialist in internal medicine and drug metabolism (McMahon, Tr. 3710–13).

282. The Tulane team conducted two double-blinded, randomized clinical trials (McMahon, Tr. 3711, 3719–20; RX 31).

283. The McMahon studies were undertaken at the behest of American Home, which made a grant in 1974 directly to the Tulane University Medical School to support the clinical tests (McMahon, Tr. 3713). In 1976, prior to the completion of the second study, Dr. McMahon became aware that the studies [85]were being conducted

for possible use in litigation by American Home (McMahon, Tr. 3713, 3834–35).

284. Dr. McMahon admitted that his initial reluctance to even consider such a study was overcome in large part by American Home's promise to increase the amount of grant money to Tulane University, which in part was to be used to support his research group. As Dr. McMahon stated: ". . . American Home Products was willing to pay Tulane University an awful lot of money and we are a poor school and the school needed the money. So, when they raised the grant, to tell the truth, we just—needed the money to support our group and to support the school" (McMahon, Tr. 3716).

285. The protocols for the studies were designed by American Home's Medical Department in consultation with Drs. Lasagna, Arthur Grollman and Kenneth Melmon. The protocols were also reviewed and approved by Drs. McMahon, Jain and Ryan (McMahon, Tr. 3715–17).

286. The first study was conducted on patients with moderate to severe uterine cramping and episiotomy pain. Patients with uncomplicated vaginal delivery were screened by a history and physical examination; those who met the entrance criteria were admitted into the study. The patients were evenly divided between episiotomy and uterine cramping pain, and were randomized into three treatment groups: 24 received 650 mg. aspirin, 24 received Anacin and 22 received placebo. The initial baseline pain intensity was severe in 34 patients and moderate in 36 patients (McMahon, Tr. 3719–22; RX 28; RX 31).

287. Two tablets of each medication were given as a single dose in a randomized manner without the patient, nurse observer or supervising physician aware of which medication was being given (McMahon, Tr. 3717–20; RX 28; RX 31).

288. Patients were closely watched by a trained nurse observer at one hour, two hours, two and one-half hours, three hours, three and one-half hours and four hours after administration of the medication for purposes of assessing the patients' pain and pain relief (McMahon, Tr. 3722; RX 28; RX 31).

289. The first study did not demonstrate any statistically significant differences between the Anacin-like formulation and plain aspirin in any of the parameters measured during any phase of the study (McMahon, Tr. 3874; Lasagna, Tr. 4865–66). **[86]**Therefore, this study does not establish the superiority of Anacin over aspirin to the satisfaction of scientists (Lasagna, Tr. 4866). Moreover, when the results on patients in moderate pain only (*i.e.*, the degree of pain for

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which such products are actually used) are examined separately, the two drugs appear virtually identical (Lasagna, Tr. 4866).

290. The second McMahon study was conducted on patients with severe episiotomy or uterine cramping pain. A minimum 60% baseline pain intensity on the pain analog scale was required for admission into this study, which was also double-blinded and included 70 post-partum patients, 47 with severe episiotomy pain and 23 with severe uterine cramping pain. Patients were randomized into three treatment groups: 23 received 650 mg. aspirin, 23 received Anacin and 24 received placebo (McMahon, Tr. 3717, 3720, 3761–63, 3764).

291. Observations were made by the nurse observer at hours 0, 1, 2, 3 and 4. The pain intensity and pain relief scores were recorded on an ordinal scale of zero to 8, rather than zero to 4 as in the first study, because it was determined that the zero to 8 range would provide additional sensitivity and reliability. A visual analog pain scale and a global performance rating were also used in the second study (McMahon, Tr. 3762–67; RX 29; RX 31).

292. The second study did not show any statistically significant differences between the two test drugs for the test population, as a whole. However, the Anacin-like formulation was statistically significantly better than aspirin on the subgroup of severe episiotomy pain during the second and third hours after administration on two of the four parameters (pain intensity and pain analog). There were, however, no statistically significant differences between the two test medications either in the subgroup suffering from severe uterine cramping pain alone or in the combined population of severe episiotomy pain patients and severe uterine cramping pain patients (McMahon, Tr. 3773–75, 3881–82; Okun, Tr. 4527–31).

293. As set forth in detail below (F. 294–311, *infra*), the claimed superiority of Anacin over common 5 grain aspirin that is reported in RX 31 cannot be taken at face value for the reason that the methodology adopted and employed in the studies was seriously flawed in several important respects.

294. One of the fundamental requirements for a good clinical test design is that the purpose of the study be set out in advance (F. 203, *supra*). The subjective response [87]methodology that is generally utilized in the clinical testing of mild analgesics will conventionally set out the so-called null hypothesis which assumes that the drugs being tested cannot be differentiated from one another. The purpose of the study is to demonstrate that this null hypothesis is either correct or incorrect. Assuming anything but the null hypothesis introduces an opportunity for bias which can distort the data and

render the results invalid. With regard to both studies in RX 31, Dr. McMahon believed, and the written protocol in the first study presumed, that the Anacin-like formulation would prove superior in pain relief to plain aspirin. In fact, Dr. McMahon admitted that, from the outset of the study, he was unequivocally convinced that the additional aspirin in Anacin made the product superior to plain aspirin (McMahon, Tr. 3896–98).

295. The stated purpose of the first clinical study conducted by Dr. McMahon was to assess pain relief resulting from the administration of the three study medications, Anacin, aspirin and placebo, in 70 post-partum pain patients, and to test the sensitivity of the testing methodology utilized. Each Anacin tablet contained 400 mg. aspirin and 32 mg. caffeine; each aspirin tablet contained 325 mg. aspirin. The physical properties of all three tablets were identical (*i.e.*, same size and color, with no embossing) to assure that the procedure was double-blinded (McMahon, Tr. 3717, 3720; RX 31C).

296. In order to make clinical test results applicable to a commercial product, it is important that either the commercial product itself be used or that the test medication be analyzed to assure that its chemical and bioavailability characteristics are equivalent to the commercial product in question. In this light, the conclusions in RX 31 pertaining to Anacin are questionable. The methodology called for using a medication other than commercially available Anacin; no effort was made independently to determine how the test medication compared to Anacin. Dr. McMahon admitted that he had no idea how the test medications actually compared to the commercially available products in terms of bioavailability or other characteristics (McMahon, Tr. 3838–39; Lasagna, Tr. 4867). [88]

297. Dr. McMahon conceded that, although he opted not to use actual Anacin tablets, there were ways in which the commercially available products could have been used without compromising the double-blinding. These methods include putting the Anacin tablet in a capsule or actually placing the Anacin tablet in the patient's mouth (McMahon, Tr. 3840). On the other hand, four tablets could have been given to each subject, with two tablets containing the distinctive Anacin insignia and two remaining unmarked; however, one set of tablets (either the marked or the unmarked) would have been a placebo (DeKornfeld, Tr. 2820–22).

298. Another important criterion in the design and execution of clinical tests utilizing the subjective response methodology is that the written protocol which is prepared in advance of the study be rigorously adhered to throughout the course of the testing. Failure to

adhere to the written protocol provides an opportunity for bias which can diminish the reliability of the test results (F. 203, *supra*). The methodology employed in RX 31, however, was defective in this regard because Dr. McMahon departed from the written protocol as it applied to sleeping patients (McMahon, Tr. 3864–66).

299. First, the protocol required that sleeping patients be awakened. If this were not possible, then they were to be assigned their prior score. There were three instances in the first 15 patients in the first study where neither of these instructions was followed. Dr. McMahon failed to catch these errors at the conclusion of the study and failed to review the impact of the errors to determine whether or not the data on those patients should be discarded (McMahon, Tr. 3864–68). Respondents' witness, Dr. Lasagna, stated that such errors should have been caught by the investigator and their impact evaluated in terms of potential bias (Lasagna, Tr. 4858–59).

300. The methodology employed in the studies reported in RX 31 is further flawed in that, throughout the course of the testing, test data was reported on a continuing basis to American Home, which held the code to the medications and analyzed the test results. Ongoing "peeking" and evaluation of data by the party most interested in favorable results for one medication is generally recognized as injecting bias into a study and necessitates a more critical review of the ultimate conclusions (McMahon, Tr. 3837–38, 3841–42; Lasagna, Tr. 4864; F. 203, *supra*).

301. Another basic criterion in the design of a subjective response clinical test methodology is that the type of statistical analysis to which the data will be subjected [89]should be set forth in the protocol and followed (F. 203, *supra*).

302. A statistical analysis of the first study was performed by Dr. I. Lee, a biostatistician from Ives Laboratory, a division of American Home, using a multivariate analysis based on a split plot design, to determine whether there were statistically significant differences between the three test medications with respect to the reduction of pain intensity, pain relief and pain analog (McMahon, Tr. 3730–31; RX 28; RX 31). A separate, independent statistical analysis was also done by another firm (McMahon, Tr. 3731; RX 28). Three separate analyses were performed based on all cases, "severe" cases only and "moderate" cases only (McMahon, Tr. 3730–36; RX 28; RX 31).

303. Statistical analyses of the second study were conducted by two independent biostatisticians: Dr. Sylvia Wassertheil-Smoller of the Albert Einstein College of Medicine in New York City and Dr. Bruce Schneider, the head of the Biostatistics Section of Wyeth

Laboratories, Inc., an ethical pharmaceutical division of American Home (McMahon, Tr. 3767–68; RX 29; RX 31).

304. Both parametric and non-parametric tests were used in the statistical analysis. Tests for differences among treatments in the 47 patients with severe episiotomy pain were performed by the non-parametric Kruskal-Wallis analysis on the actual scores, on change from baseline scores and on percentage change from baseline. An analysis was also performed by one-way analyses of co-variance, which adjusts the scores for baseline differences. In all, 12 one-way analyses of variance were done: one for each of the four time periods for each of the pain categories—episiotomy, uterine and uterine plus episiotomy. The analyses compared the analgesic effects of Anacin, aspirin (650 mg.) and placebo as measured by the pain analog, pain intensity, and pain relief scores at baseline 1, 2, 3 and 4 hours (McMahon, Tr. 3768; RX 29; RX 31).

305. The methodology employed in both studies was defective because, notwithstanding the fact that the protocol specified a "fixed sample" analysis of 90 to 130 patients, the studies were actually subjected to a "sequential analysis." However, a fixed sample statistical method was utilized to evaluate the sequential data. Use of the sequential analysis caused the study to be terminated when, after "peeking" at the data, American Home determined that statistical significance had been reached for the Anacin-like formulation (McMahon, Tr. 3843–44). **[90]**

306. Dr. McMahon admitted that the written protocol called for neither a sequential analysis nor for termination once statistical significance had been reached for the Anacin-like formulation (McMahon, Tr. 3844). Dr. Lasagna commented that such a procedure is highly unusual and injects bias into the results (Lasagna, Tr. 4860).

307. Dr. Lasagna further stated that a sequential analysis would have required that the study stop once statistical significance was reached for either of the active test medications (Lasagna, Tr. 4861).

308. It is reasonable to conclude that the McMahon study would not have been stopped if aspirin, at any point, had achieved statistical significance (McMahon, Tr. 3844).

309. The methodology employed in RX 31 is further flawed in that the analysis by separate subgroups of episiotomy and uterine cramp pain patients was conceived after the initial analysis of both studies failed to demonstrate any statistically significant difference between test medications on the combined episiotomy and uterine cramp pain population (McMahon, Tr. 3756, 3757, 3775, 3883). Such an analysis arose only out of hindsight and demonstrates further

deviation from the statistical analysis that was set out in advance to provide assurance against "massaging" the data (Forrest, Tr. 463; Azarnoff, Tr. 604, 643; Moertel, Tr. 955; DeKornfeld, Tr. 2778–79, 2783–84; Kantor, Tr. 3619; CX 367Z074–Z075). Dr. Lasagna noted that the more one looks at the data after the test is completed, the more one might get "statistical slippage," *i.e.,* a greater chance that differences will be found (Lasagna, Tr. 4876).

310. In addition to the numerous and serious deficiencies in methodology, the actual report itself is flawed in that data unfavorable to American Home was omitted from the final draft. Dr. McMahon agreed that the studies, as reported in RX 31, omitted certain data (McMahon, Tr. 3884–86).

311. The data omitted from RX 31 would have demonstrated that the second study failed to show any statistically significant differences between aspirin and the Anacin-like formulation in the combined episiotomy and uterine cramp pain subgroups, a result which Dr. Lasagna indicated would not have been surprising (Lasagna, Tr. 4873–75. See also McMahon, Tr. 3775, 3881–82; Okun, Tr. 4527–28). **[91]**

312. Respondents' experts' contention boils down to a belief that if something works for severe pain, then it will work for mild to moderate pain (headache pain) as well (See, *e.g.*, Lasagna, Tr. 4068–69; Okun, Tr. 4332–35, 4337–38, 4341, 4352). However, the record does not support the view that all pain is alike (F. 204, 313–17, *infra*).

313. Drs. Kantor, Lasagna and Okun agreed that uterine cramping pain responses differ from episiotomy pain responses (Kantor, Tr. 3559–60; Lasagna, Tr. 4883–84; Okun, Tr. 4537–39, 4547–48). Dr. Lasagna also testified that migraine headache pain does not respond to aspirin because of its different etiology (Lasagna, Tr. 4069–70; CX 367H-I).

314. Even if the results of the McMahon studies were to be taken at face value, their applicability to headache pain is open to serious doubt. Dr. McMahon admitted that the comparative efficacy of some analgesics may vary, depending on the type of pain involved (McMahon, Tr. 3834). Dr. Lasagna noted that there was no way to guess which of the two types of pain studied in RX 31 (*i.e.,* uterine cramp pain or episiotomy pain) is more like headache pain (Lasagna, Tr. 4883).

315. Furthermore, although Dr. McMahon felt that the failure of the first study to show any statistically significant differences between aspirin and the Anacin-like formulation was due to the "insensitivity" of a pain model which covered the broad spectrum of moderate to severe pain, he admitted that other qualified investiga-

tors have obtained statistically significant differences between aspirin and placebo in studies utilizing a similar pain model (McMahon, Tr. 3875).

316. Dr. Lasagna conceded that comparative efficacy of one analgesic drug over another must be shown in several different types of pain before generally assuming that the drug would be superior to another in untested types of pain (Lasagna, Tr. 4968). Drs. Kantor and Okun also admitted that the type of pain involved may affect the relative efficacy of two analgesic drugs (Kantor, Tr. 3645–46; Okun, Tr. 4422).

317. Complaint counsel's witnesses insisted that at least one of the two well-controlled clinical studies necessary before claims of comparative efficacy can be considered to have been established must make use of an appropriate pain model, *i.e.,* the particular pain in question, before the results can be applied to that type of pain (F. 204, *supra*). **[92]**

318. The first McMahon study, when broken down into subgroups, demonstrated no statistically significant differences between Anacin and aspirin. Dr. McMahon admitted that statisticians would not accept any of his conclusions from the first test as showing Anacin's superiority. He further admitted that the Anacin-like formulation did not achieve the 95% confidence level of superiority, generally required among scientists to constitute statistical significance on any parameter (McMahon, Tr. 3752, 3754).

319. The second McMahon study does not demonstrate superiority for the Anacin-like formulation on the overall population tested. The data does not reveal any statistically significant differences between aspirin and the Anacin-like formulation in the uterine cramp pain subgroup, even though that pain model was sufficiently sensitive to significantly discriminate between the active medications and placebo (McMahon, Tr. 3887, 3891).

320. While the McMahon study (RX 31), whether considered alone or in conjunction with the dose-response curve evidence for aspirin, may arguably provide a reasonable basis for the claim that Anacin is more effective than regular aspirin in the relief of pain, including the pain of headache (McMahon, Tr. 3733, 3742–43, 3758, 3775, 3875, 3883, 3923, 4008; Lasagna, Tr. 4052–53, 4058–60, 4072, 4074–75, 4960; Okun, Tr. 4337–38, 4341–46, 4381), it does not demonstrate that the claim has been scientifically established.

6. *Blood Level Studies*

321. The record indicates that no correlation has as yet been

established between the amount of analgesic in the bloodstream and the degree of pain relief. Thus, blood level studies are not an accepted basis for predicting comparative analgesia (F. 222, *supra*).

322. Furthermore, the FDA OTC Internal Analgesics Panel has concluded: "In the case of analgesic agents, the relationship between blood levels and pharmacologic effectiveness has not been well established. A comparison **[93]**of blood levels may offer a basis of comparison between different formulations of the same agent but are at present almost meaningless in comparing chemically different classes of analgesic agents." (CX 367Z007. See also CX 367 O, Z004).

7. *Conclusion*

323. Both complaint counsel's and respondents' witnesses generally concurred that the superiority of Anacin to OTC internal analgesics other than aspirin has never been scientifically established (Forrest, Tr. 470; Azarnoff, Tr. 612; Moertel, Tr. 960, 978; DeKornfeld, Tr. 2788; McMahon, Tr. 3812–13; Lasagna, Tr. 4112–18).

324. The standard for establishing the superior efficacy of Anacin to OTC analgesics other than aspirin is the same as that for aspirin: two well-controlled clinical tests (Lasagna, Tr. 4112–13). No such clinical tests exist.

325. The challenged representation in Paragraph 10(A) of the Complaint, that it has been established that a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other non-prescription internal analgesic, is not only unfair to consumers but also false since the greater effectiveness of Anacin has not been scientifically established. In light of the evidence, there existed a substantial question recognized by experts qualified by scientific training and experience to evaluate the efficacy of such drugs as to the validity of such representations.

C. *The Scientific Tests Cited In The Challenged Advertisements Do Not Prove That Anacin Is As Effective A Pain Reliever As Darvon Compound 65 Or More Effective Than Any Other Non-Prescription Pain Reliever*

326. Darvon Compound 65, in approximately 1970, was the leading prescription analgesic product on the market (Moertel, Tr. 993).

327. The results of two clinical investigations evaluating Anacin and Darvon in the relief of headache pain were the basis of a limited series of print advertisements which stated that clinical investigations had shown Anacin to be as effective as the leading prescription

analgesic for the relief of headache pain (Ans. of American Home, ¶ 17; Shaul, Tr. 3362–74). Advertisements referring to these tests further represented **[94]**that Anacin was more effective for the treatment of headache pain than other OTC analgesics (F. 99–108, *supra*).

328. The two clinical studies conducted on behalf of American Home were carried out under the direct supervision of Dr. Bernard Teschner at the Bulova Watch Company (CX 302) and Dr. James Lay at Texas Instruments Company (CX 301); the studies compared the effectiveness of Anacin to Darvon Compound 65 (Shaul, Tr. 3362–74).

329. Dr. Bernard Teschner, Medical Director of Bulova Watch Company, conducted the first study (CX 302) comparing Anacin to Darvon Compound 65. The protocol for the study was designed by Dr. Leo Winter of Leo Winter Associates, an organization specializing in designing, conducting and supervising clinical evaluations, and approved by Dr. Shaul. The Darvon capsules used in the study were purchased commercially and remained unaltered so as not to modify the bioavailability of the drug. The Anacin tablets formulated for this study had the embossed arrow deleted so that the pills could not be identified by the patients if they accidentally observed the pill before swallowing it from the opaque vial. A total of 400 patients participated in the study (Shaul, Tr. 3362–69; CX 302).

330. Statistical analysis of the Teschner study was performed by Dr. Nathan Jaspen, an independent biostatistician, who confirmed that no statistically significant differences existed between the drugs for either the amount of pain relief provided or the speed of onset of relief, although Anacin had fewer adverse side effects than Darvon Compound 65 (Shaul, Tr. 3369–76; RX 93; CX 302).

331. A second Anacin-Darvon study was conducted by Dr. James V. Lay, Medical Director at Texas Instruments Company. The study was done under the same general conditions as the Teschner study, except for the inclusion of identical-looking placebos for both compounds. The Lay study involved 638 patients suffering from tension headache (Shaul, Tr. 3371–73; CX 301).

332. The data of the Lay study showed that the placebos were ineffective in comparison to the active drugs, indicating that the test methodology was sensitive. Dr. Nathan Jaspen, a biostatistician, reviewed the data from the Lay study and confirmed that there were no statistically significant differences regarding the effectiveness for pain relief or speed of onset of pain relief between Anacin and Darvon Compound 65, and that **[95]**Anacin had fewer adverse side effects (Shaul, Tr. 3373–76; Moertel, Tr. 977; RX 95; CX 301).

333. Complaint counsel's expert witness, Dr. Moertel, stated that

he would accept the Lay study as evidence of the proposition that two Anacin tablets are essentially equivalent to one Darvon Compound 65 capsule (Moertel, Tr. 977). Moreover, Drs. Forrest, DeKornfeld and Moertel conceded that Anacin is as effective as Darvon Compound 65 (Forrest, Tr. 513; Moertel, Tr. 995, 997–98; DeKornfeld, Tr. 2819–20).

334. Dr. Moertel also testified that it is well-known in the medical community that two Anacin tablets were equally effective or probably more effective than one Darvon Compound 65 capsule, and that his own clinical studies on Darvon reached the same conclusion (Moertel, Tr. 993–98; RX 92; CX 360; CX 361D; CX 362P).

335. However, neither CX 301 nor CX 302 constitute adequate scientific support for claims that Anacin is equal in effectiveness to Darvon Compound 65. While the tests do attempt to compare Anacin to Darvon Compound 65 for the relief of headache pain, serious flaws in their design and execution render their results unreliable (F. 336–40, *infra*).

336. Neither Dr. Teschner nor Dr. Lay had previous experience in conducting clinical tests on analgesic drugs (CX 611Z142, Z143).

337. The Teschner study (CX 302) failed to include a placebo and was not double-blinded since Darvon was given in capsule form and Anacin in tablet form (Forrest, Tr. 481; Moertel, Tr. 972–73).

338. The Teschner study also failed to stratify patients for important pain parameters. The result was that the group of persons receiving Darvon had more severe headache and sinus headache pain than the group receiving Anacin. This would tend to introduce a bias into the study favoring Anacin (Moertel, Tr. 972–73).

339. While the Lay study (CX 301) incorporated a placebo, it was not truly double-blind. Although the active ingredients looked identical, the placebos looked like the drugs they represented (Darvon capsules and Anacin tablets), thus making them identifiable and distinguishable (Forrest, Tr. 478; Moertel, Tr. 974–75, 977–78; DeKornfeld, Tr. 2820). **[96]**To eliminate patient expectation due to the form of the dosage administered, each administration should have included one capsule and one tablet, *i.e.,* a capsule and tablet placebo, Anacin and a capsule placebo, or Darvon and a tablet placebo (DeKornfeld, Tr. 2820). The failure to double-blind resulted in the "Darvon" placebo having several times more side effects than the "Anacin" placebo, although both placebos were inert (Moertel, Tr. 974).

340. Therefore, the tests reported in CX 301 and CX 302 do not prove that Anacin is as effective as the leading prescription analgesic drug, Darvon Compound 65, in the relief of pain.

341. Furthermore, even assuming that the tests reported in CX 301 and CX 302 did prove that Anacin is as effective as Darvon Compound 65, they would provide no support whatsoever for the claim that Anacin is more effective for the relief of pain than any other OTC analgesic (Forrest, Tr. 483; DeKornfeld, Tr. 2794; Lasagna, Tr. 4202; Okun, Tr. 4436). The tests did not compare Anacin to other OTC analgesics, but rather to Darvon Compound 65, and there is no reason to believe that the latter, although a prescription product, is more effective than OTC products including 5 grain aspirin (Forrest, Tr. 514; DeKornfeld, Tr. 2820).

342. The only means of establishing Anacin's superiority to other OTC analgesics is through well-controlled clinical studies comparing Anacin to those analgesics (F. 197, 199, 200 and 225, *supra*).

D. *Anacin Does Not Relieve Tension*

343. Tension is recognized as a term difficult to define precisely. Complaint counsel's expert witness, Dr. Karl Rickels, chairman of the FDA Advisory Review Panel on Over-The-Counter Sedative, Tranquilizer and Sleep-Aid Drug Products ("FDA OTC Sedative Panel"), testified that tension refers to a state, originating from a large group of emotional factors, which may exhibit as its symptoms fearfulness, panic, irritability, heart palpitations and perspiration (Rickels, Tr. 1199, 1201–02, 1212). He further associated tension more with muscle spasms and anxiety related to the emotional aspects just described (Rickels, Tr. 1201). **[97]**

344. The FDA OTC Sedative Panel views tension as an umbrella term, and includes depression, anxiety, somatic complaints attributed to emotional factors and psychoneurotic states as several forms of tension. Indeed, tension is sometimes used synonymously with the term "anxiety" (Rickels, Tr. 1201–03; CX 366Z002).

345. Tension may exhibit headache pain as one of its symptoms in the same way that tension may exhibit fearfulness or irritability as a symptom. In such instances, the headache pain is caused by the underlying tension. This situation is referred to as the "tension-headache-tension" cycle (Rickels, Tr. 1219, 1240).

346. Underlying tension may, however, exist simultaneously with, although independently of, headache pain. In this case, the headache pain is caused by factors other than the underlying tension. The headache pain may also aggravate the tension state (Rickels, Tr. 1198–99).

347. Underlying tension is commonly treated by psychiatric counseling, tranquilizers or a combination of the two. Such treatment will act to relieve the tension and should relieve any symptoms

associated with it, such as headache pain (Rickels, Tr. 1182–86, 1199, 1205–06, 1240; CX 367I).

348. The tension-headache-tension cycle is also treated with tranquilizers. This treatment is recommended by the FDA OTC Sedative Panel (Rickels, Tr. 1240; CX 366Z003).

349. In order to establish the tension-relieving action of a drug, well-controlled, randomized, double-blinded clinical studies in populations in which the drug might be expected to be effective are necessary (Rickels, Tr. 1186–88; F. 197, 200 and 225, *supra*). Such tests have been required for proof of absolute or comparative efficacy of prescription and non-prescription drugs since the late 1950's (Rickels, Tr. 1228–29; F. 199, *supra*).

350. In a well-controlled, double-blinded clinical study of Compoz, Librium, aspirin and placebo, with normal doses administered to patients suffering moderate degrees of tension, aspirin was found not to be significantly superior to placebo in tension relief (Rickels, Tr. 1195–97). The study showed no differences in results whether or not the population was combined or broken down into those who also suffered moderate headache pain and those who did not (Rickels, Tr. 1197). **[98]**

351. The literature regarding the tension-relieving properties of aspirin is consistent with the results of the "Compoz study," and confirms that it is erroneous to consider a therapeutic dose of aspirin as a tension reliever (Rickels, Tr. 1198, 1205). In addition, the FDA OTC Internal Anaglesics Panel has concluded that non-prescription internal analgesics are "clearly ineffective" for "nervous tension" (CX 367K). Similarly, the FDA OTC Sedative Panel determined that aspirin was "ineffective" as a "daytime sedative" product, which the Panel defined as one that claims "daytime mood-modifying indications such as for the relief of occasional simple nervous tension" (CX 366E, Z002). The weight of the evidence does not support the conclusion that aspirin and OTC analgesics will relieve tension, unless the tension is a symptom of headache pain.

352. Where an individual is suffering from tension, which manifests headache pain as one of its symptoms, aspirin is neither appropriate nor indicated for the treatment of the underlying tension (Rickels, Tr. 1203–04). Aspirin can only aid in relieving pain and, consequently, will have no lasting effect on underlying tension (Rickels, Tr. 1204–05; 1226, 1235–39). If underlying anxiety or tension are present along with headache pain, then aspirin will, at the most, provide only temporary relief; once the effects of the aspirin wear off, the underlying tension can be expected to return (Rickels, Tr. 1205, 1218–20).

353. Respondents' witness, Dr. Lasagna, agreed with Dr. Rickels on the relationship between analgesics and tension caused by headache pain, underlying tension and tension existing independent of headache pain (Lasagna, Tr. 4198–99).

354. The only sense in which aspirin can be considered a tension reliever is that it may indirectly and secondarily relieve tension caused wholly by pain, while not affecting underlying tension (Rickels, Tr. 1204, 1236; Lasagna, Tr. 4198).

355. Caffeine, a known central nervous system stimulant useful in the treatment of physical fatigue in daily doses of 100 to 200 mg. (which exceeds the amount in Anacin), is contraindicated for the treatment of nervousness, stress and tension. Stimulant drugs generally counteract states of physical fatigue. A combination of caffeine with aspirin (*i.e.,* Anacin) is ineffective for the treatment of nervous tension (Rickels, Tr. 1207–10; F. 264, 266, *supra*). **[99]**

356. Both the president and medical director of Whitehall Laboratories, the division of American Home responsible for Anacin and APF, admitted that American Home did not have a reasonable basis for the claim that Anacin relieves tension (Shaul, Tr. 3398; DeMott, Tr. 4765).

357. Therefore, Anacin does not relieve nervousness, tension, stress, fatigue or depression, nor will it enable persons to cope with the ordinary stresses of everyday life.

E. *It Has Not Been Established That APF Will Cause Gastric Discomfort Less Frequently Than Any Other Non-Prescription Internal Analgesic*

358. A recommended dose of APF is one or two tablets, for a two-tablet total of 972 mg. micronized aspirin, 40.28 mg. dried aluminum hydroxide gel and 120.84 mg. magnesium hydroxide (F. 11, *supra*).

359. Micronized aspirin refers to aspirin formulated in smaller than the usual size particles (Plotz, Tr. 1060; Sliwinski, Tr. 1136; CX 367Z006).

360. The micronized aspirin in APF, in combination with the above-mentioned antacids, is compressed into tablet form (Sliwinski, Tr. 1136; Shapiro, Tr. 3115).

361. Bioavailability may be defined as "[t]he rate and extent of absorption as determined by the measurement of the blood levels of the parent drug and/or its active metabolites relative to a standard product. The standard product chosen must be one which has been demonstrated to be safe and effective." (Azarnoff, Tr. 581; CX 367Z007).

362. Drug absorption is influenced not only by the formulation of

the drug, but also by physiological variables of the gastrointestinal function (such as gastric emptying, intestinal transit time and intestinal and hepatic metabolism) (Shapiro, Tr. 3113–15; CX 367Z007).

363. Gastric discomfort includes pain and discomfort in the upper portion of the abdomen, heartburn and nausea. These are subjective symptoms (Grossman, Tr. 849; Plotz, Tr. 1047).

364. Respondents' expert witness, Dr. Shapiro, testified that finely milled aspirin in small particle size (*i.e.,* **[100]**micronized aspirin) enhances dissolution and, therefore, allows for more rapid absorption (bioavailability) from the gastrointestinal tract with the results that there will be less gastric discomfort than with a plain aspirin formulation (Shapiro, Tr. 2965, 3163; CX 367Z007).

365. However, Dr. Shapiro conceded that, since the ingredients in APF are compressed into tablet form, it is difficult to ascertain the ultimate particle size and any theoretical advantage to micronization may be lost (Shapiro, Tr. 3115, 3163–64).

366. The only study which Dr. Shapiro relied upon for his opinion that micronized aspirin caused less gastric distress was by Gyory and Steil. He admitted, however, that the Gyory study used capsules (*i.e.,* uncompressed micronized aspirin) and addressed blood loss as opposed to dyspepsia. Dr. Shapiro conceded that he was in error in relying on the Gyory study (Shapiro, Tr. 3111–15).

367. Dr. Sliwinski, complaint counsel's expert witness, stated that particle size alone will not determine the amount of gastric discomfort. Other operative factors include how the particles are stuck together and the rate of dissolution (Sliwinski, Tr. 1136–37, 1165). Dr. Plotz also indicated that particle size is one of several factors that may be expected to play some role with regard to gastrointestinal effects (Plotz, Tr. 1089–90).

368. The relationship between the rate of absorption of an analgesic and gastrointestinal discomfort has not been established (Grossman, Tr. 850–52, 869–70; Sliwinski, Tr. 1154–55, 1165). The FDA OTC Internal Analgesics Panel reported that "there is little meaningful difference between the rates of absorption of sodium salicylate, aspirin and the numerous buffered preparations of salicylates." (CX 367Z008).

369. There is no evidence that micronization of aspirin particles confers any favorable properties to aspirin beyond those found with plain aspirin (Plotz, Tr. 1078, 1089–90; CX 367Z006). "Favorable properties," as used in this context, refers to a decrease in the incidence of gastric discomfort (Plotz, Tr. 1079–80).

370. Therefore, it has not been established that micronized

aspirin particles in a tablet (*e.g.,* APF) result in less gastric discomfort than ordinary aspirin (Grossman, Tr. 850–52; Plotz, Tr. 1061–62; Sliwinski, Tr. 1149, 1165). **[101]**

371. Dried aluminum hydroxide gel and magnesium hydroxide are recognized as antacid, or buffering, agents (F. 14, *supra;* CX 367F). An antacid may be defined as "[a]n agent that reacts with acid, such as the hydrochloric acid in the stomach (gastric acid), to neutralize it (decrease its amount)." (CX 367Z003).

372. Dr. Shapiro testified that buffers reduce the incidence of gastric discomfort as compared with ordinary aspirin (Shapiro, Tr. 2964–66, 3042–45).

373. Dr. Lasagna testified that the buffers that are present in aspirin preparations may be important in terms of gastric irritation if they affect the dissolution rate of a drug because the quicker the aspirin gets into solution, the less likely it is to cause gastric irritation and discomfort (Lasagna, Tr. 4192–93. See also F. 361, 362, 364 and 365, *supra*). However, he conceded that, while he was chairman of the NAS/NRC Panel (F. 34, *supra*), the Panel concluded that most of the published studies indicated little difference in the incidence or intensity of gastric discomfort after ingestion of Bufferin or plain aspirin (Lasagna, Tr. 4192–93).

374. The FDA OTC Internal Analgesics Panel reported that: "[C]urrent evidence indicates that properly formulated preparations . . . can be expected to (1) increase the rate of absorption of aspirin relative to a plain aspirin tablet; (2) decrease the incidence of subjective gastric intolerance in some of the relatively small percentage of persons in the general population who regularly experience gastric intolerance with OTC doses of plain aspirin tablets." (CX 367Z100. See also CX Z004–Z005). However, the Panel also stated: "Based upon the total evidence available to the Panel, it concludes that the evidence is insufficient to substantiate the claims that buffered or highly buffered aspirin solution is safe for use in patients who should not take regular, unbuffered (plain) aspirin." (CX 367Z101).

375. Two well-controlled clinical studies are required to establish that APF causes less gastric discomfort than other OTC internal analgesics (Plotz, Tr. 1049; Sliwinski, Tr. 1130; Shapiro, Tr. 3103, 3104; F. 197, 199, 200 and 225, *supra*). The tests must, *inter alia,* be double-blinded (Plotz, Tr. 1049; Sliwinski, Tr. 1129–31; Lasagna, Tr. 4135; F. 210 and 211, *supra*), randomized and the study population carefully defined (Plotz, Tr. 1049; Sliwinski, Tr. 1130–31; F. 203 and 207–09, *supra*).

376. There have been no well-controlled clinical studies that

demonstrated that buffered aspirin causes less [102]gastric discomfort than plain aspirin (Grossman, Tr. 862, 869–70). The Paul study cited by the FDA OTC Internal Analgesics Panel, for example, lacked proper controls such as double-blinding and failed to use a control group (Shapiro, Tr. 3069, 3090, 3097).

377. CX 304, a study entitled "Arthritis Pain Formula Evaluation," is the only clinical study known by respondents to have evaluated the extent to which APF causes gastric bleeding and gastric discomfort or distress (CX 611Z144). The study, conducted for American Home by Dr. Jerome Rotstein, compared APF to a placebo and to commercial buffered aspirin (CX 304B).

378. CX 304 reported that APF demonstrated significantly less gastrointestinal irritation and occult bleeding than buffered aspirin (CX 304). However, CX 304 is not an acceptable well-controlled clinical test for purposes of establishing that APF causes gastric discomfort less frequently than other OTC internal analgesics (F. 379–82, *infra*).

379. The stated purpose of the clinical trial reported in CX 304 was to compare the efficacy of APF and 5 grain buffered aspirin (CX 304F). The study did not question patients about gastric discomfort (CX 304; Plotz, Tr. 1055, Sliwinski, Tr. 1141).

380. The authors of the study utilized a stool guaiac test, which measures the amount of occult blood loss, as support for their finding that APF demonstrated significantly less evidence of gastrointestinal irritation than other OTC analgesics. Stomach distress, however, is a subjective symptom (Shapiro, Tr. 3069), and the amount of blood in the stool is irrelevant in evaluating such discomfort. Dr. Plotz considered the use of a stool guaiac test for this purpose inadequate and discounted it entirely (Plotz, Tr. 1055–58).

381. The study is also seriously flawed by the different dosage schedules used for the two products. The buffered aspirin was not only given more often, but also more frequently on an empty stomach when gastric irritation is more likely to occur. The different schedules eliminated any possibility that the study was double-blind (Plotz, Tr. 1054–56; Sliwinski, Tr. 1139, 1161).

382. Drs. Plotz and Sliwinski found CX 304 so defective as to render its results useless. The study is inadequate [103]to support the conclusion that APF causes gastric discomfort less frequently than other buffered products, much less any other OTC analgesic (Plotz, Tr. 1054–60, 1079; Sliwinski, Tr. 1138–47, 1161–62).

383. It has not been established that the addition of buffers (antacids) of the amount and kind present in APF reduces the incidence of gastric distress attributable to aspirin (Grossman, Tr.

850–53; Plotz, Tr. 1053, 1062–63, 1084–86; Sliwinski, Tr. 1148–49; Lasagna, Tr. 4192).

384. Therefore, the challenged representation in Paragraph 10(B) of the Complaint, that it has been established that APF will cause gastric discomfort less frequently than any other OTC analgesic, is false inasmuch as the greater safety of APF has not been established. Moreover, there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety of such drugs, as to the validity of the representation.

F. *The Other Representations In Respondents' Advertisements Are False Or Unfair*

385. American Home has represented that Anacin contains more pain dulling ingredients than any other OTC internal analgesic, that its analgesic ingredient is unusual, special and stronger than aspirin, and that the product contains twice as much of its analgesic ingredient as other marketed products (F. 66–98, *supra*). These representations are false.

386. There are other analgesic products on the market which contain as much or more pain dulling ingredients than does Anacin (Ans. of American Home, ¶ 9; F. 194, *supra*).

387. Anacin's analgesic ingredient is not unusual, special or stronger than aspirin, since it is nothing other than aspirin (F. 11 and 14, *supra*). Anacin's only other ingredient, caffeine, is not an analgesic (F. 263, *supra*). Indeed, both aspirin and caffeine are commonplace substances, available in many products (Ans. of American Home, ¶ 23).

388. Anacin does not contain more than twice as much analgesic ingredient as all other analgesic products on the market (Ans. of American Home, ¶ 9; F. 193 and 194, *supra*).**[104]**

389. American Home has also represented that within 22 seconds after taking Anacin a person may expect relief from headache pain (F. 148–55, *supra*). This representation is false, since relief from Anacin is not obtained within that period of time (Non-Contested Issue of Fact 16).

390. Respondents American Home and Clyne have represented that APF's analgesic ingredient is unusual, special and stronger than aspirin (F. 171–77, *supra*). This representation is false.

391. As with Anacin, APF's analgesic ingredient is ordinary aspirin (F. 11 and 14, *supra*). Micronization of the aspirin in APF has not been shown to confer any special analgesic qualities to the aspirin (F. 365–67 and 369–70, *supra*), nor do antacids play any

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analgesic role, having been shown only to have a buffering potential (F. 371–74 and 383, *supra*).

392. Through reference to a "Doctors' Survey," American Home also made certain representations regarding doctors' preferences for Anacin, as set forth in Complaint Paragraph 20 (F. 109–15, *supra*). These representations are unfair and deceptive because the survey on which they were based does not provide a reasonable basis for the representations (CX 342; CX 343; Rossi, Tr. 1621–25; F. 393 and 394, *infra*).

393. The response rate to the Doctors' Survey was 10%; this is too low to provide a basis for any advertising representation or for generalizing to any group of physicians (CX 342A, CX 343; Rossi, Tr. 1623). A response rate of at least 50% to a mail survey, such as the one at hand, is necessary before the results can be generalized; where a precise estimate is desired, the response rate should be at least 70%. Such minimum levels of acceptability must be met because it is possible to obtain a higher response rate in a mail survey than in a telephone or face-to-face survey. A respondent who does not respond to a survey questionnaire received through the mail may be reacting to the content of the questionnaire which makes the likelihood of response bias higher than in a telephone or face-to-face survey where the respondent is less aware of the content of the survey when he or she chooses whether or not to participate (Rossi, Tr. 1623–25). Moreover, American Home conducted no follow-up mailings to attempt to increase the unacceptable level of return in this survey (CX 611Z154).

394. The sample in this survey was comprised of physicians with a primary speciality in internal medicine, **[105]**under the age of 65 years, in private practice in the 50 states and who do not object to receiving promotional mail (CX 342A). To the extent that such a group of physicians is different from physicians with the same specialty, but who object to receiving promotional mail, a further bias is injected into the survey (Rossi, Tr. 1624).

V. Disclosure of Aspirin and Caffeine

A. *General Background*

395. The Complaint charges that respondents failed to disclose the alleged material fact that Anacin contains aspirin and caffeine and that APF contains aspirin; that these are well-known and commonplace substances widely available in many products; that they may be injurious to health; and that, if this were known, it would likely affect certain consumers' consideration of whether to

purchase such products. Disclosure of these facts is sought for all of the advertising of Anacin and APF (Comp. ¶ 23).

396. The essential questions posed by the Complaint on the question of ingredient disclosure are: (a) whether the side effects of aspirin and caffeine are so serious and widespread as to pose a hazard to the consuming public; and, if so, (b) whether disclosure in all advertising is required to bring knowledge of these ingredients to that group of the population which may be "at risk" from the ingestion of these drugs.

397. Both Anacin and APF contain aspirin; in addition, Anacin also contains caffeine (F. 11, *supra*).

398. Aspirin is a well-known and commonplace substance. It is generally recognized as safe and effective (F. 14, *supra;* Moertel, Tr. 998–99).

399. Caffeine is a well-known and commonplace substance widely used in consumer products such as coffee, tea, cocoa and cola-based soft drinks (RX 244Z039).

400. The active ingredients and directions for use of Anacin and Arthritis Pain Formula are clearly disclosed on the packaging and labeling of these products (F. 12, *supra*).

401. Anacin advertising did not disclose that aspirin or caffeine is an ingredient in Anacin (Ross, Tr. 1880; Smith, [**106**]Tr. 7550; Ans. of American Home, ¶¶ 7 and 22). Advertisements for APF did not disclose that APF contains aspirin (Ans. of American Home and Ans. of Clyne, ¶¶ 7 and 22).

402. Both complaint counsel's and respondents' expert witnesses generally agree that some consumers are unaware of the ingredients of products like Anacin and APF, and that this is an area of concern (See, *e.g.*, Farr, JTr. 2592; Grossman, Tr. 858, 909; Moertel, Tr. 985; Shapiro, Tr. 2984–85; Falliers, Tr. 3228–30, 3263–64; Lasagna, 4195).

403. Certain groups of individuals, including those suffering from rheumatoid arthritis, contain a substantial number of chronic users of aspirin and aspirin-containing products. Such individuals as a group would, therefore, be more susceptible to possible adverse reactions from aspirin ingestion than the general population (Plotz, Tr. 1040, 1043–44, 1052; Sliwinski, Tr. 1111).

404. Complaint counsel's witness, Dr. Moertel, admitted that the side effects from aspirin are clinically insignificant except for a small group of individuals for whom they could be severe (Moertel, Tr. 998. See also Falliers, Tr. 3232; Shapiro, Tr. 2942–43). Respondents' expert witnesses are generally in accord with this statement (See, *e.g.*, Shapiro, Tr. 2938, 2971; Falliers, Tr. 3192–95). Nevertheless,

there are groups of individuals who will suffer serious adverse effects from aspirin, some of which can be life-threatening (F. 406-52, *infra*).

405. If a consumer is unaware of the fact that he or she should avoid aspirin, disclosure of aspirin in advertising would provide no benefit to that individual (See, *e.g.*, Farr, JTr. 3635; Falliers, Tr. 3269).

B. *Gastrointestinal Side Effects*

1. *Aspirin*

406. Aspirin can result in adverse reactions in the gastrointestinal tract. The possible side effects include dyspepsia (discomfort, pain, nausea and heartburn that occur in the upper abdominal area), occult (unseen) gastrointestinal bleeding, massive gastrointestinal bleeding, gross and microscopic damage to gastric mucosa (lesions), gastric ulcers and initiation or exacerbation of stomach ulcers (Grossman, Tr. 825–26, 829–30, 839–40, 849; Moertel, Tr. 984; Shapiro, Tr. 2940–41, 2944–45; CX 367Z014, Z020). **[107]**

407. Dyspepsia due to ingestion of aspirin is a common occurrence (Grossman, Tr. 825; Shapiro, Tr. 2945). The estimated incidence of dyspepsia in individuals who take small doses of aspirin over short periods of time is 5 to 10% (Grossman, Tr. 826; CX 367Z017). The estimated incidence among those who take larger doses over longer periods of time, such as arthritics, is 20 to 30% (Grossman, Tr. 826–27; Plotz, Tr. 1048).

408. While the symptoms of dyspepsia are frequently associated with peptic ulcer disease and gall bladder disease, when the symptoms occur in the absence of these two diseases the dyspepsia is usually temporary (Shapiro, Tr. 2944–45).

409. All individuals experience some occult bleeding (*i.e.*, imperceptible loss of blood) from the gastrointestinal tract after aspirin ingestion. However, such bleeding is not clinically important. Any relationship between such occult bleeding and massive gastrointestinal bleeding or gastric discomfort has not been established (Grossman, Tr. 837–39, 871; Plotz, Tr. 1046–47; CX 367Z019–Z021).

410. Aspirin can cause unpredictable, massive and life-threatening bleeding in the gastrointestinal tract. Massive gastrointestinal bleeding is always due to some type of lesion (damage to gastric mucosa) (Grossman, Tr. 829–30, 844–45, 862–63; Moertel, Tr. 984; Shapiro, Tr. 2943).

411. Although the mechanism of action of aspirin on the gastrointestinal tract has not been definitively established, Dr. Grossman testified regarding two ways in which aspirin can cause

damage to the gastric mucosa: (a) by a topical action (Davenport effect) which involves a local action of the aspirin acting directly on the mucosa (this explains acute diffuse minor lesions); or (b) by a systemic effect in which aspirin reaches the mucosa through the blood (Grossman, Tr. 841–44).

412. Clinically important gastrointestinal blood loss can lead to weakness and shock, and may require hospitalization (Grossman, Tr. 829). Massive gastrointestinal blood loss is the most serious adverse side effect of aspirin on the gastrointestinal tract and can be lethal (Grossman, Tr. 830; CX 367Z021).

413. The incidence of massive bleeding is low, although the total occurrence is not insignificant (Grossman, Tr. 844–45; CX 367Z022). There is a recognized higher risk of massive gastrointestinal blood loss in all persons with peptic ulcers, those who have previously experienced gastrointestinal bleeding and those with dyspepsia (Grossman, Tr. 846; CX 367Z022).

414. Despite the fact that the benefit-to-risk ratio for aspirin is quite favorable on the side of aspirin's safety and massive gastrointestinal bleeding is a rare occurrence, the mortality rate associated with this condition [**108**]is 4 to 10%, including those persons whose bleeding was induced by aspirin (Grossman, Tr. 830–31).

415. Aspirin in large doses may cause gastric ulcers. Aspirin may even produce a specific kind of ulcer, not seen in its absence (Grossman, Tr. 831–32; CX 367Z020).

416. Dr. Grossman testified that gastric ulcer is a serious disease, causing significant morbidity as well as significant complications, such as bleeding, obstruction of the stomach outlet and perforation of the gastric ulcer which can produce peritonitis, that often lead to surgery on the stomach (Grossman, Tr. 833).

417. By conservative estimate, aspirin ingestion results in 10 out of every 100,000 users developing a gastric ulcer which requires hospitalization. Levy's Boston Collaborative Group study also estimated that one-eighth of all gastric ulcers were related to aspirin (Grossman, Tr. 845; CX 367Z020–Z021).

418. Dr. Grossman reported that a recent survey has shown aspirin to be the second most frequent drug implicated in hospital admissions. Of 7,017 admissions surveyed, adverse drug reactions influenced 260, or 3.7%, of the admissions, with aspirin involved in 24 out of the 260, or 9%. Thus, aspirin accounted for 0.3% of all the admissions surveyed (Grossman, Tr. 877–80; CX 367Z022 which reported on the results of a survey by the Boston Collaborative Drug Surveillance Program).

419. It is evident from the record that aspirin poses a serious

public health problem, in terms of gastrointestinal effects, to certain groups of individuals in the population.

420. It is noted that the FDA OTC Internal Analgesics Panel has recommended that the following warning appear on all aspirin-containing products, regardless of formulation: "Caution: Do not take this product if you have stomach distress, ulcers or bleeding problems except under the advice or supervision of a physician." (CX 367Z025).

2. *Caffeine*

421. Respondents' expert witness, Dr. Shapiro, testified that the amount of caffeine in two Anacin tablets is approximately the amount of caffeine in one-half cup of coffee (Shapiro, Tr. 2968–69, 2997). On this basis, he stated his [**109**]belief that the amount of caffeine in a recommended dose (two tablets) of Anacin (F. 11 and 12, *supra*) would have no physiological effect on the gastrointestinal tract (Shapiro, Tr. 2968–70).

422. Complaint counsel's expert witness, Dr. Grossman, testified that caffeine could increase the injurious effects of aspirin since it stimulates the secretion of gastric acid, although he admitted that it is not absolutely known how caffeine increases the secretion of gastric acid (Grossman, Tr. 860). However, he conceded that this proposition is not established; he stated that he viewed it as a reasonable assumption.

423. Dr. Grossman also suggested that caffeine may cause peptic ulcers (Grossman, Tr. 855, 872–77. See also Lasagna, Tr. 4194), and that it inhibits platelet aggregation (Grossman, Tr. 866–67; CX 367Z114).

424. The record shows that caffeine, when used as an adjuvant, is safe at a single dose of 65 mg. not to exceed 600 mg. in 24 hours (Shapiro, Tr. 2969–70; CX 367Z114). The recommended dosage of Anacin is within this range (F. 11–12, *supra;* Shapiro, Tr. 2969).

425. Therefore, caffeine has not been shown to pose a serious public health problem.

C. *Aspirin Intolerance Among Asthmatics And Respiratory Side Effects*

426. Aspirin can also cause respiratory side effects. These adverse reactions include effects on the respiratory system ranging from shortness of breath to severe life-threatening asthmatic attacks, and anaphylactic shock involving laryngeal swelling, blocking of air pathways and a sudden drop in blood pressure which can result

in death unless treated rapidly (Stevenson, JTr. 1481; Farr, JTr. 2571–72; Falliers, Tr. 3188–90, 3232; CX 367Z027–Z028).

427. Asthma is a reversible obstructive airway disease of unknown origin; it is not a true allergy (Stevenson, JTr. 1479–80; Farr, JTr. 2565–66).

428. An asthmatic attack involves a spasm and subsequent constriction of the bronchial tubes. Symptoms include shortness of breath, coughing and, in severe cases, hypoxia (insufficient delivery of oxygen to red blood cells), shock and occasionally death (Stevenson, JTr. 1481; CX 367Z027). **[110]**

429. Ingestion of from 3 mg. to 650 mg. aspirin may cause an asthmatic attack among those members of the asthmatic population who are aspirin-idiosyncratic (allergic to aspirin) (Stevenson, JTr. 1480–81).

430. The severity of the aspirin-induced asthmatic attack depends on the degree of bronchial constriction prior to ingestion of the aspirin; if the bronchial tubes are already partly closed, the attack can be severe or possibly life-threatening (Stevenson, JTr. 1488–89).

431. Asthmatics are made up of two subgroups: intrinsic asthmatics whose asthma is not precipitated by external or environmental causes and is characterized by nasal polyps, rhinitis, sinusitis and chronic asthma; and extrinsic asthmatics whose asthma is due to environmental factors (such as food, ragweed, dust, etc.) (Falliers, Tr. 3187–92, 3197–98; CX 367Z027).

432. A small group of severe intrinsic asthmatics, who have bronchial asthma, rhinitis and/or sinusitis may be particularly susceptible to idiosyncratic reactions from aspirin ingestion. The other intrinsic and extrinsic asthmatics are, however, unlikely to experience a higher degree of aspirin idiosyncrasy than the incidence in the general population (Falliers, Tr. 3187–92, 3197–98; Farr, Tr. 3459, 3468–69, 3486, 3490, 3544; CX 367Z028–Z029).

433. Neither micronizing aspirin, as is done in APF, nor combining aspirin with other ingredients, as is done in both APF and Anacin, will reduce the possibility of aspirin-induced side effects in asthmatics (Farr, JTr. 2575; Stevenson, JTr. 1490–91).

434. Although the number of asthmatics in the general population and the number of asthmatics who are sensitive to aspirin are not precisely known, the incidence of individuals susceptible to asthmatic attacks caused by aspirin ingestion is not insignificant (F. 435–42, *infra*).

435. The record reveals that the range of the cumulative incidence for all asthma cases in the general population is 2 to 12%,

while the prevalence incidence is 0.4 to 8% (Stevenson, JTr. 1493–95; Farr, JTr. 2576–86; Falliers, Tr. 3193–95, 3202–03; CX 367Z027).

436. Dr. Stevenson, testifying for complaint counsel, cited a 1972 study by Davis concluding that 9 million persons were under some form of medical care for asthma (Stevenson, JTr. 1494). [111]

437. The Tecumseh Study, an epidemiological study of the health problems of the residents of Tecumseh, Michigan, and the most thorough evidence available on the incidence of asthmatics in the general population, reported that 6% of the townspeople of Tecumseh were afflicted by conditions previously diagnosed as asthma; another 6% revealed medical histories consistent with asthma (Stevenson, JTr. 1494).

438. Figures on the incidence of aspirin intolerance in the asthmatic population vary because different populations are surveyed, different methods of classification are used and different definitions of sensitivity are assigned. As a general rule, incidence figures based on medical histories tend to be considerably lower than figures based on oral challenge procedures.

439. The record indicates that incidence figures for aspirin intolerance among asthmatics ranges from 0.1% to 28% (Stevenson, JTr. 1495–98; Farr, JTr. 2589–2605).

440. Respondents' witness, Dr. Falliers, testified that the results of a survey of case histories he conducted disclosed that only 1.9% of the asthmatics exhibited adverse reactions to aspirin ingestion. However, he admitted that his study did not involve the evaluation of aspirin sensitivity through aspirin challenge procedures, and that the medical literature involving challenges did not support his low figure (Falliers, JTr. 3192, 3219, 3238).

441. In contrast, Dr. Stevenson conducted a study in which he orally challenged with aspirin a group of asthmatics who were not known to be sensitive to aspirin. On the basis of the results of this study, he concluded that a 10% incidence of aspirin intolerance in asthmatics would be a conservative figure. The record, as a whole, supports Dr. Stevenson's conclusion (Stevenson, JTr. 1498–1501; Farr, JTr. 2597–2605).

442. It is noted that the FDA OTC Internal Analgesics Panel concluded that 6 to 20% of all asthmatics are sensitive to aspirin (CX 367Z027).

443. Therefore, the threat that aspirin presents to asthmatics who are aspirin-idiosyncratic has been shown to pose a serious public health problem. [112]

D. *Other Side Effects*

444. Aspirin may cause dermal allergic reactions. These adverse reactions include effects on the skin such as urticaria (hives), angioedema (giant hives and swelling) and rash (Stevenson, JTr. 1511–12; Farr, JTr. 2564; CX 367Z028).

445. While such reactions are not usually life-threatening (Stevenson, JTr. 1512; CX 367Z028), urticaria may be serious if the lining of the stomach is involved and angioedema may be fatal if swelling takes place in the vocal chords and cuts off breathing (Stevenson, JTr. 1511–13).

446. The overall incidence of allergic reactions to aspirin is such that the American Academy of Allergy, a professional organization with a membership of some 2,200 allergists, adopted the following resolution in 1973:

> While recognizing that acetylsalicylic acid (aspirin) is a valuable drug, the American Academy of Allergy recommends that a formulation containing aspirin and advertisements promoting the formulation should clearly indicate that the preparation contains aspirin and that aspirin can be harmful to some persons.

In the same year, the American College of Allergists, another professional organization of allergists, passed a similar resolution (Farr, JTr. 2608–12).

447. The FDA OTC Internal Analgesics Panel stated its agreement with the Academy resolution (CX 367Z028–Z029). It is noted that the Panel has recommended that the following warning should appear on all products containing aspirin:

> This product contains aspirin. Do not take this product if you are allergic to aspirin or if you have asthma except under the advice and supervision of a physician. (CX 367Z029).

448. Since aspirin may present potential harm to the fetus as well as hazards to the mother during pregnancy and delivery, it should be avoided by women during the later stages of pregnancy (Lasagna, Tr. 4188; CX 367Z035).

449. The FDA OTC Internal Analgesics Panel has suggested that all aspirin-containing products should state the following warning on their labels:

> Do not take this product during the last 3 months of pregnancy except under the advice and supervision of a physician. (CX 367Z035). **[113]**

450. Aspirin can produce adverse side effects on renal and hepatic functions, such as salicylate hepatitis. These adverse reactions can result from even small or normal doses (Plotz, Tr. 1082–83; Sliwinski, Tr. 1123).

451. It is recognized that aspirin is capable of exerting a systemic

effect on the blood, as manifested by aspirin's possible effects on the clotting mechanism which could lead to a change in platelet adhesiveness (Sliwinski, Tr. 1123).

452. Aspirin can also change the action of other medications that an individual might be taking. For instance, aspirin binds to a serum protein. If an individual were taking other medications that also bind to serum protein, then the aspirin could displace the other drugs with the result that the individual may experience greater clinical effects from those other drugs. This is true for drugs such as the anticoagulant medications and some of the diabetic medications (Sliwinski, Tr. 1123–24).

E. *Disclosure of The Presence Of Aspirin*

453. The disclosure in advertising of the presence of aspirin in Anacin and APF would be beneficial to the significant segments of the population who should avoid aspirin for the medical reasons stated above, and who may not be aware that these products contain aspirin (Stevenson, JTr. 1519, 1691–92; Farr, JTr. 2608–14; Moertel, Tr. 1019–21).

454. There are large numbers of people who should avoid aspirin and are so warned by their physicians (See, *e.g.*, Grossman, Tr. 847–48; Lasagna, Tr. 4188–89, 4198).

455. Dr. Stevenson, testifying for complaint counsel, stated that he warns patients identified as aspirin-idiosyncratic to avoid aspirin. However, he noted that most asthmatics do not know whether or not they are aspirin-sensitive; consequently, they should avoid aspirin as a precaution (Stevenson, JTr. 1502). Immunologists generally warn asthmatics to avoid aspirin (Farr, JTr. 2601, 2606).

456. Dr. Shapiro, testifying for respondents, stated that he warns patients with active ulcers to avoid using salicylate-containing compounds, including aspirin (Shapiro, Tr. 2998).

457. Many patients are unaware that an OTC analgesic, which does not contain "aspirin" in its name, contains [114]aspirin. This raises the distinct possibility that some individuals warned to avoid aspirin will take it without knowing that the OTC analgesic product they are taking contains aspirin (F. 402, *supra*).

458. Respondents' witness, Dr. Falliers, admitted that his own study of aspirin idiosyncracy revealed that patients took OTC analgesic drugs, such as Anacin, without knowing that the products contained aspirin (Falliers, Tr. 3210). Complaint counsel's witness, Dr. Grossman, was also aware of instances in which his patients took Anacin without knowing of its aspirin content (Grossman, Tr. 901).

459. A significant number of consumers do not know and have

not known for a substantial period of time that Anacin contains aspirin.

460. In a survey of consumers conducted by the Gallup organization in 1964,[4] 17% of a nationally projectable sample identified aspirin as an ingredient in Anacin on an unaided basis; 78% of the sample could not name any ingredient (CX 467H). In that same study, when consumers were directly asked whether aspirin was an ingredient in Anacin, 65% answered affirmatively (Ross, Tr. 2285–88; CX 467J).

461. In the 1967 and 1970 Oxtoby-Smith studies (CX 451 and CX 452), consumers indicated a general lack of awareness of ingredients by the magnitude of their responses to the question, "I have little idea of ingredients in the headache tablets I take." In 1967, approximately 54% of Anacin users agreed with that statement; in 1970, approximately 42% agreed with that statement (Ross, Tr. 2295; CX 1058Z480; CX 1059Z180).

462. In the 1972 Pain Reliever Telephone Study (CX 468),[5] 23% of the consumers surveyed were able to identify aspirin as an ingredient in Anacin; 71% could not name any ingredient (Ross, Tr. 2292–93; CX 468Z002–Z003).

463. Complaint counsel's expert witness, Dr. Moertel, conducted an informal survey of two samples of individuals **[115]**with whom he came in contact in his duties at the Mayo Clinic. The first sample consisted of 100 patients and their family members who came to the cancer treatment center at the Currie Pavillion of the Clinic. The second sample consisted of 100 paramedical personnel. Each respondent was given a list with a number of drugs on it and was asked to check either "yes," "no" or "don't know" regarding whether each drug contained aspirin. In the 100 patient/family member sample, 71% correctly answered "yes" to the ingredient question about Anacin; 4% said Anacin did not contain aspirin; 25% checked the "don't know" response (Moertel, Tr. 986–89).

464. The record shows that consumers do not always read or study package labels of OTC drugs before taking them in order to determine whether a particular product contains aspirin when instructed to do so by their physicians. Moreover, it is unknown whether all physicians instruct susceptible patients not only to avoid aspirin *per se*, but also other OTC drugs containing aspirin by brand name, *e.g.*, Anacin (Stevenson, JTr. 1509–20, 1727; Farr, JTr. 2557–58, 2606–07, 3568; Falliers, Tr. 3228–30; F. 402 and 457–58, *supra*). Based on these factors, Dr. Falliers, respondents' own witness, stated

[4] See Appendix I, pp. 12–13, for a description of the methodology of this study.

[5] See Appendix I, pp. 13–14, for a description of the methodology of this study.

that it is "important for the patient[s] to know they are taking aspirin" and that the ingredients in a drug product should be communicated to the public in the best way possible (Falliers, Tr. 3263–64).

465. Therefore, the fact that Anacin and APF contain aspirin is a material fact which should be disclosed in advertising in order to protect the significant number of consumers who might otherwise be misled into purchasing and ingesting aspirin, with serious adverse effects to their health (F. 419 and 443, *supra*).

466. The fact that Anacin contains caffeine is not a material fact and need not be disclosed in advertising (See F. 425, *supra*).

VI. Liability Of The C.T. Clyne Company

467. Clyne participated in the development and dissemination of some of the challenged APF advertisements in its capacity as advertising agency for American Home (F. 9, *supra*). **[116]**

468. Clyne was involved in analytical and evaluative work to determine the effectiveness of at least some of the challenged APF advertisements (CX 610, Stip. 6).

469. Throughout the relevant time period, Clyne had no scientific or medical experts on its staff. Clyne submitted each advertisement for APF to American Home for review and approval. No advertisement for APF was disseminated to the public until it had been approved by American Home's scientific and medical experts and other appropriate American Home personnel (CX 610, Stip. 4).

470. The following advertisements for APF were among those depicted in the films and storyboards admitted into evidence in this proceeding:

Films	Storyboards
CX 201	CX 201A
CX 202	CX 202A
CX 203	CX 203A
CX 204	CX 204A
CX 205	CX 205A
CX 206	CX 206A
CX 207	CX 207A
CX 210	CX 210A
	CX 217
	CX 218

(CX 610, Stip. 8).

471. Through the use of advertisements, such as some of those listed in F. 470, *supra,* the representation that APF's analgesic ingredient is unusual, special, and stronger than aspirin (Comp. ¶ 8(B)(1)) was made by respondents and would be understood by consumers (F. 171–77, *supra*).

472. The representation that APF will eliminate all pain, stiffness and discomfort usually experienced by arthritis sufferers in the morning (Comp. ¶ 8(B)(2)) was not made in any of the challenged advertisements (F. 178–80, *supra*).

473. Through the use of advertisements, such as some of those listed in F. 470, *supra,* the representation that APF will cause gastric discomfort less frequently than any other [117]non-prescription internal analgesic (Comp. ¶ 12(B)) was made by respondents and would be understood by consumers (F. 181–85, *supra*).

474. Through the use of advertisements, such as some of those listed in F. 470, *supra,* the representation that it has been established that APF will cause gastric discomfort less frequently than any other non-prescription internal analgesic (Comp. ¶ 10(B)) was made by respondents and would be understood by consumers (F. 186–89, *supra*).

475. Clyne was aware that aspirin was a commonplace substance, available in many products (Non-Contested Facts, ¶ 15).

476. The presence of aspirin in APF is disclosed in labeling, packaging and product inserts (Non-Contested Facts, ¶ 13).

477. Clyne should have known, from looking at APF's label, that its analgesic ingredient was aspirin. Therefore, Clyne either knew or should have known that the representation that APF's analgesic ingredient is unusual, special and stronger than aspirin was false.

478. It is reasonable to assume that Clyne relied in good faith on the substantiation information (F. 479 and 480, *infra*) furnished by American Home.

479. The only clinical evidence known to Clyne which purported to evaluate the extent to which APF causes gastric bleeding and gastric discomfort or distress was CX 304, entitled "Arthritis Pain Formula Evaluation" (CX 611Z144; F. 377, *supra*). The study was provided to Clyne by American Home's research division, Whitehall Laboratories (CX 611Z169).

480. CX 304 reported that APF showed a significantly lower incidence of gastrointestinal irritation than buffered aspirin (F. 378, *supra*).

481. Therefore, it was reasonable for Clyne to rely in good faith on the substantiation information furnished by American Home (F. 479 and 480, *supra*) with respect to the representation that it has been established that APF will cause gastric discomfort less frequently than any other non-prescription internal analgesic. [118]

VII. Other Relief[6]

A. *Introduction*

482. Complaint counsel seek corrective advertising to remedy the false representations that are found to have been made in the challenged advertisements.

483. Consequently, complaint counsel bear the burden of showing that members of the purchasing public currently hold an image that:

(a) it has been established that Anacin is more effective for the relief of pain than aspirin;

(b) it has been established that Arthritis Pain Formula will cause gastric discomfort less frequently than aspirin;

(c) Anacin will relieve nervousness, tension, stress, fatigue and depression and will enable persons to cope with the ordinary stresses of everyday life.

484. To warrant a corrective advertising order, complaint counsel also must show that the images referred to in F. 483, *supra*:

(a) are significantly attributable to the false advertisements;

(b) have caused and are likely to continue to cause the purchase of Anacin or APF by members of the purchasing public; and

(c) will endure for some period of time after the false representations cease in the absence of corrective messages.

485. Complaint counsel have not introduced any direct evidence concerning the images listed in F. 483 (a) and (b), *supra*. Therefore, such images must be inferred if a [119]corrective advertising provision directed to them were to be justified.

B. *Consumer Images Of Anacin And APF*

486. The term, "consumer image," as used in this proceeding, describes the entire context of attitudes and beliefs that consumers have about a particular product (Leavitt, Tr. 1251; Ross, Tr. 2048; Smith, Tr. 5549–50, 7454–58).

487. Although two of the alleged images for which complaint counsel seek corrective advertising are "it has been established that

[6] The issue of the disclosure of the ingredients in Anacin and APF is discussed in Section V, *supra*, entitled *Disclosure of Aspirin and Caffeine*.

Anacin is more effective for the relief of pain than aspirin," and "it has been established that APF will cause gastric discomfort less frequently than aspirin," complaint counsel did not offer any evidence to demonstrate the existence of such images, nor did complaint counsel's expert witnesses testify that any consumer held such images of Anacin and APF (F. 485, *supra*).

1. *The Penetration Studies*

488. The term, "advertising penetration," as used in this proceeding, describes the extent to which advertising themes and claims remain in consumers' minds.

489. Advertising penetration is to be distinguished from copy tests (*i.e.*, ASI Audience Reaction Tests). Copy tests (See F. 50, *supra*, for definition) determine the meanings that consumers perceive from specific individual advertisements; consumers are usually questioned within one day after exposure to an advertisement concerning what that advertisement said or meant. Advertising penetration, on the other hand, measures the extent to which advertising themes and claims have reached consumers. Advertising penetration studies do not address consumers' recall of specific, individual advertisements. Rather, they are directed at the generalized type of off-the-top-of-the-head, or unaided, recall that is picked up when consumers are asked what they can remember about a product's advertising (Ross, Tr. 2015–16; Smith, Tr. 5534, 5545–46, 7442–49).

490. By design, surveys measuring advertising penetration allow a whole panoply of environmental factors to intervene between the time consumers were exposed to a **[120]**mix of advertising and the time they are asked to recall what it said (Ross, Tr. 2015–16; Smith, Tr. 5545–46, 7442–49).

491. Four commercial consumer marketing surveys, CX 453, 455, 462 and CX 477,[7] explored the levels of Anacin advertising penetration in 1973, 1970, 1969 and 1971, respectively.

492. The questions in these surveys were, for the most part, open-ended, and were directed towards a general, unaided recall of Anacin advertising, rather than towards a particularized recall of specific, individual claims. Such open-ended questions tend to understate the true level of recall of Anacin's advertising, thereby creating a built-in aura of conservatism regarding the data; indeed, they probably establish the minimum level of the range of recall within the population surveyed (Ross, Tr. 2028–29).

[7] Appendix I contains a description of the methodology utilized in each of the surveys. See Appendix I, pp. 3–4 for CX 453, pp. 6–8 for CX 455, pp. 10–11 for CX 462 and pp. 14–15 for CX 477.

493. Evidence from CX 462, the *1969 Excedrin Study* provides support for this view. This study is the only penetration study that contained a closed-ended, or aided, recall question (CX 462Z147). The magnitude of the responses to the aided question confirms the view that responses to unaided, open-ended advertising penetration questions understate the actual registration of Anacin advertising in the minds of consumers (CX 462Z095; Ross, Tr. 2033–34). The results show that 29% of the total sample surveyed correctly associated the claim, "Has twice the amount of pain reliever doctors recommend most," with Anacin (CX 462Z095). Consumers' attribution of this claim to Anacin, coupled with their correct attribution of other competing claims to Anacin's competitors, demonstrates that consumers' advertising recall is not the result of random comminglings of claims for different products, as was contended by respondents' expert witness, Dr. Smith (Smith, Tr. 5548–49). Rather, consumers are demonstrating that they can correctly recall advertising for a particular brand (Ross. Tr. 2033–34). Moreover, the responses to this question show that Anacin's superior efficacy claims were remembered by consumers (CX 462Z095). **[121]**

494. The results from the four studies, compiled together in Table I, *infra,* demonstrate that, consistently over the four-year period from 1969 to 1973, more than one-third of the various populations sampled on advertising penetration recalled some Anacin advertising on an unaided basis, *i.e.,* off the top of their heads (Ross, Tr. 2025–27, 2035–37, 2039–42).

TABLE I

Percent of Total Respondents Who Recalled Any Advertising for Anacin

1969[1]	*1970*[2]	*1971*[3]	*1973*[4]
34%	37%	34%	46%

[1] CX 462Z090, Z146: "What do you recall being said in any advertising [during the past six months] for Anacin?"

[2] CX 455Z012, Z121; CX 456S: "Do you *recall* seeing or hearing any advertising for Anacin in the past four weeks?"

[3] CX 477C, W; CX 1009B: "What does any advertising you have recently seen or heard say about Anacin?"

[4] CX 453Z027, Z031, Z107: "Have you seen or heard any recent advertising for any headache remedies or pain relievers?" "For which products or brands?" "Do you remember hearing or seeing any recent advertising for Anacin?"

495. Table II, *infra,* indicates the percentage of consumers who demonstrated recall for the superior efficacy and tension relief claims in Anacin's advertising, using as a base those respondents who recalled anything about Anacin's advertising (Ross, Tr. 2028, 2038). In assessing the extent to which these consumers were remembering superior efficacy claims for Anacin, their recall claims pertaining to more or extra ingredients, doctors' recommendations and superior pain relieving speed and strength should also be considered, since these attributes are elements of superior pain relieving efficacy (Ross, Tr. 2017–22, 2404–07; F. 120 and 121, *supra*). **[122]**

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TABLE II

Unaided Advertising Penetration
Based On Respondents Who Recalled Any Advertising For Anacin

CX 462 (1969) 1/		CX 477 (1971) 2/		CX 453 (1973) 3/	
Stronger	9%	Stronger	9%	Stronger/Extra Strength	4%
Quick/Fast Acting	24%	Faster	15%	Faster Acting	16%
Combination of Ingredients	18%	More Ingredients	12%	Extra Ingredients/ Contains More Aspirin	5% 1%
Two Anacin as good as four aspirins (others)	6%			More Effective Than Aspirin	4%
Works/Better 4/	6%	Better/Best/More Effective	6%		
		More Relief	6%		
Recommended by Most Doctors/ 4 out of 5 Doctors	9%				
		Tension	6%	Relieves Tension	2%

1/ CX 462, Z092; Ross, Tr. 2029-30.
2/ CX 477W; Ross, Tr. 2036-37, 2213-14.
3/ CX 453, Z035; Ross, Tr. 2042-43, 2214-15.
4/ Some of the comments coded under "works/better" may not have been comparative. Hence, the percentage of recall in this category that relates to comparative efficacy may be inflated (Ross, Tr. 2030).

[123]496. Table II, *supra,* as presented, reflects some respondents who demonstrated recall of more than one element in Anacin's advertising (Ross, Tr. 2031–32). Although the percentages in Table II overlap to that extent, it is reasonable to conclude that approximately one-third of those respondents who recalled any Anacin advertising consistently remembered Anacin as making superior pain relieving efficacy claims (Ross, Tr. 2024, 2043–45). In fact, 45% of those respondents who had any advertising recall in 1971 reflected a state of mind bearing directly on the recall of superior pain relieving efficacy claims (CX 477X; Ross, Tr. 2038).

497. In analyzing the magnitude of this *unaided* recall of superior efficacy claims, the absolute percentages are not as important as are their size relative to the recall of other types of claims (Ross, Tr. 2032, 2038–39). In CX 462, approximately 21% of the respondents recalled Anacin's advertising as claiming that it was a "pain reliever," and approximately 6% recalled claims that Anacin "relieves headaches" (CX 462Z092). In CX 477, approximately 21% mentioned "pain" related claims, approximately 7% mentioned claims that Anacin "relieves pain" and approximately 18% mentioned "headache" (CX 477W). In CX 453, approximately 7% mentioned claims that Anacin "relieves pain" and approximately 7% mentioned "relieves headaches" (CX 453Z035).

498. These levels of recall for general claims which were admittedly made creates the context against which the magnitude of recall of superior efficacy and tension relief claims shown in Table II should be judged.

499. Although the levels of *unaided* recall for tension relief claims, shown in Table II, *supra,* are generally lower than for superior efficacy claims, they become meaningful upon comparison with similarly low levels of unaided recall for claims dealing with the relief of other symptoms for which Anacin is used (Ross, Tr. 2213–15). In CX 477, approximately 3% of the respondents (figures are, again, based on those respondents who remembered any Anacin advertising) mentioned "colds/flu," approximately 3% mentioned "general" symptoms and approximately 18% mentioned "arthritis" (CX 477W). In CX 453, approximately 1% of the respondents mentioned "muscle aches and pains" and approximately 6% mentioned [124]"arthritis" (CX 453Z035). Due to the type of questions utilized, the fact that no "tension relief" code was established for responses in CX 462 does not necessarily mean that no such claim was remembered. It may mean that there were not enough respondents who recalled the tension relief claim to justify creating a separate code, a distinct possibility in light of the fact that all of the

recall figures in all of the studies are low in an absolute sense (Ross, Tr. 2016).

500. The advertising penetration data in the record demonstrates that significant numbers of consumers recalled, on a long-term basis, the superior efficacy and tension relief claims made by American Home in its advertising (Ross, Tr. 2024, 2212–17).

2. *The Consumer Image Studies*

501. Five consumer research studies, CX 451, 452, 454, 455 and CX 457,[8] conducted in 1967, 1970, 1967, 1970 and 1975, respectively, purported to examine consumers' images of analgesic products, including Anacin.

502. Four of these studies, CX 451, 452, 454 and CX 455 were commercial consumer marketing surveys. They were conducted at different times during 1967 and 1970 by different research organizations, for different clients, using different methodologies, drawing upon different samples and with no litigation in mind. They yielded consistent findings regarding consumers' beliefs and images of Anacin and of the other major advertised OTC analgesic products (Ross, Tr. 2048, 2235–36; Rossi, Tr. 1615; Smith, Tr. 5948).

503. Although these four studies were neither perfectly designed nor flawlessly executed, they are, in general, of the kind and quality normally used by business firms to guide their marketing efforts (Smith, Tr. 5948). The fact that these studies generated consistent results over a relatively short period of time (three to four years) enhances their reliability (Smith, Tr. 5950–51). **[125]**

504. The fifth study, CX 457, was conducted for complaint counsel for use in this litigation (Leavitt, Tr. 1270; Crespi, JTr. 2456). It represents the most recent evidence adduced in this proceeding of consumers' images of Anacin (See F. 501, *supra*).

505. Although CX 457 suffers from a serious defect in that its interview completion rate was only about 50% (Crespi, JTr. 2294–96; CX 1053), it is the sole study that attempted to assess consumers' comparative images about the effectiveness of Anacin versus aspirin (Ross, Tr. 2049), the core issue in this proceeding.

a. The Commercial Studies

506. Although these older image studies (from 8 to 11 years old), CX 451, 452, 454 and CX 455, are not definitive proof of the current images that consumers hold regarding Anacin, these studies do

[8] Appendix I contains a description of the methodology utilized in each of the studies. See Appendix I, pp. 1–3 for CX 451, pp. 1–3 for CX 452, pp. 5–6 for CX 454, pp. 6–8 for CX 455 and pp. 8–10 for CX 457.

address specific consumer beliefs and the relationship of these beliefs to attitudes and images.

507. The various methodological flaws in each of these studies (See F. 501, n. 8, *supra*) are not fatal. While complaint counsel's expert witness, Dr. Rossi, conceded that each of the commercial image studies could not, standing alone, serve as the basis for any conclusion regarding Anacin's image, he appropriately maintained that the four studies could, standing together, provide a basis from which to make conclusions regarding Anacin's image (Rossi, Tr. 1725, 1728–29).

508. Each of these four studies focused on the four leading analgesics, namely Anacin, Bayer, Bufferin and Excedrin (CX 451Z084; CX 452Z087–Z088; CX 454F; and CX 455Z121).

509. Since none of the studies attempted to examine consumers' images of unbranded, generic aspirin, a surrogate for plain aspirin was used in order to assess consumers' comparative beliefs about the effectiveness of Anacin versus aspirin; that surrogate was Bayer Aspirin (Ross, Tr. 2049).

510. This method injects a bias into comparative analyses of beliefs about Anacin's and Bayer's effectiveness, and tends to understate the differences in consumers' beliefs about them. The bias results from the fact that Bayer is a well-known, heavily advertised, widely **[126]**used analgesic, in contrast with generic, store-brand aspirin (Ross, Tr. 2048–49; 2072–76; Smith, Tr. 7651–52, 7711).

511. In any event, if consumers are shown to believe that Anacin is a more effective pain reliever than Bayer, then it is reasonable to infer that they believe Anacin is a more effective pain reliever than aspirin.

512. The four studies conducted in 1967 and 1970 report the results for all respondents surveyed. Tables III and IV, *infra,* present the results on selected performance attributes directly related to efficacy for all respondents interviewed in CX 454 and CX 455, respectively.

TABLE III

RATINGS OF ANACIN AND BAYER ON SELECTED EFFICACY ATTRIBUTES TAKEN FROM CX 454*

Percentages Based Upon Total Sample

	Anacin %	*Bayer* %
Good for severe headache	35	37
Relieves pain for a long period	30	29
Very strong product	28	23
Relieves pain most quickly	36	40
Average "Effectiveness" Score	32.2	32.2

BASE: 605

* Table entries are the percentages of respondents who gave a top-box rating to each brand (on a 6-point scale) on the specified image attributes. Non-discriminators are included as well as respondents who discriminated among brands.

NOTE: These data taken from CX 454, *Assets and Liabilities Study of Adult Analgesics* (1967). Also see RX 139. [127]

TABLE IV
RATINGS OF ANACIN
Percentages Based On Respondents
Aware Of Each Brand

	Anacin %	*Bayer* %
Gives fast acting relief	50	46
Good for severe headache	30	28
Gives longer lasting relief	26	23
Is extra strength	24	11
BASE (Total Sample)	1,008	1,009

NOTE: Data taken from CX 456Z221–Z242, *Vanquish Positioning, User And Segmentation Study* (April 1970). These data are in response to Question 17 of the questionnaire. CX 456 provides the underlying data for CX 455. Also see RX 137A.

513. The results of the studies are broken down by various subgroups of respondents based upon their level of usage of the products rated. All four studies provide tabulated data for consumers who are "most often" (or regular) users of each of the products. Two studies, CX 454 and CX 455, permit further analysis of the tabulated data from consumers who do not use, or who do not regularly use, each of the products (Ross, Tr. 2052–53).

514. A separate analysis of users' and non-users' images of Anacin and Bayer on pain relieving efficacy attributes is more meaningful than an undifferentiated analysis of all respondents who gave their beliefs about the efficacy of the products (Rossi, Tr. 1783; Ross, Tr. 2051–52). Preference for "user versus user" and "non-user versus non-user" analyses is based upon the fact that the comparative, [128]rather than the absolute, beliefs and images of Anacin and Bayer are the issues in this case.

515. While an analysis of comparative beliefs based on the results of the total sample would provide an overview of the relative beliefs held by the undifferentiated sample, it would also tend to obscure differences between the brands surveyed (Ross, Tr. 2050–54).

516. As testified to by respondents' expert witnesses, it is only the total sample from which conclusions can be based about how the population at large (*i.e.*, the consuming public) views the products

being studied (Smith, Tr. 5951–55; Kuehn, Tr. 6708–09; Blattberg, Tr. 7120–21; Sen, Tr. 7174). For example, although a "user versus user" analysis or a "non-user versus non-user" analysis is acceptable for looking at subgroups for various analytical or diagnostic purposes, the results thereby obtained are not projectable to or representative of the consuming public (Ross, Tr. 2559–63; Smith, Tr. 5952–53; Kuehn, Tr. 6708–09; Blattberg, Tr. 6906–07; Sen, Tr. 7174).

517. It is recognized that users of a product tend to rate that product more favorably than do non-users (Ross, Tr. 2051; Jacoby, Tr. 5405–06; Smith, Tr. 5954, 7682, 7813). This bias, called user bias or user "halo," favors Bayer in the instant situation because Bayer was used more often than Anacin by the total population at the time the studies were done. The overrepresentation of Bayer users in the total sample of consumers surveyed would be expected to result in the percentage of the total sample that said favorable things about Bayer being proportionately higher than the same group as regards Anacin. The greater consumer usage of Bayer resulted in more frequent favorable ratings of Bayer by the total sample and obscured true differences in beliefs about Anacin and Bayer (Ross, Tr. 2050–54; Smith, Tr. 5956–57, 7814).

518. However, analysis of relative beliefs among users of both products and among non-users of both products will hold constant the otherwise unequal number, and thus the impact, of Bayer users' favorable ratings of their product (Ross, Tr. 2052). This is an accepted technique that is utilized so as to hold constant the inflating effects of differential product usage in a sample and, thereby, allow one to more properly ascertain the relative images of two brands (Smith, Tr. 7817–18). **[129]**

519. Table V, *infra*, presents the results on selected performance attributes for users of Anacin and Bayer that were reported in the four studies conducted in 1967 and 1970. None of these studies explicitly questioned consumers about the general pain relieving "efficacy" of the analgesics studied. However, the specific attributes reported on in Table V, focusing on the speed and strength of the products, have been shown to have a strong, logical relationship to a pain reliever's "effectiveness" (Ross, Tr. 2017–23; F. 120, 121 and 495, *supra*). Respondents' own expert, Dr. Smith, testified that the attributes of speed and strength were "sign posts" or "flags" for a pain reliever's effectiveness (Smith, Tr. 7558–60).

520. Additional support for concentrating on speed and strength-related performance attributes in these studies is furnished by Dr. Rossi, who performed a "regression analysis" (which is done to determine the relationship between covariables) of the raw data

generated in CX 457, the 1975 Leavitt Study. Dr. Rossi's analysis showed that respondents' ratings of "speed" and "strength" of Anacin, Bufferin and Excedrin were positively related to a high degree to their ratings of "efficacy" (Rossi, Tr. 1580–94).

521. The results shown in Table V, *infra,* show that users of both products believed Anacin to be superior to Bayer in terms of attributes directly related to speed and strength and, therefore, efficacy. The results of the four studies conducted in 1967 and 1970 demonstrate a consistent image of Anacin's superiority over aspirin among users of each across time, methodologies and consumer samples.

522. The results from CX 454 and CX 455, analyzed in terms of respondents who were not current users or current "most often" users (*i.e.,* non-users) of a brand, are presented in Table VI, *infra.* This "non-user versus non-user" analysis was another effort to remove, to the extent possible, the user bias that affects the ratings of all brands. Analysis of beliefs among non-users eliminates this bias by removing users' ratings from the analysis. This contrasts with the "user versus user" analysis, which holds the bias constant by limiting the analysis to users (Ross, Tr. 2052–53. See also F. 517 and 518, *supra*).

523. The data presented in Table VI, *infra,* show that non-users of Anacin and Bayer believe Anacin to be superior in speed and strength and, therefore, efficacy to Bayer. **[130]**

TABLE V

Beliefs About Anacin And Bayer

Percentages Based Upon Users Of Each Product

1967-CX 451 1/		1967-CX 454 2/		1970-CX 452 3/		1970-CX 455/56 4/	
		Believes Pain Went Quickly					
For Fast Relief				For Fast Relief		Gives Fast Acting Relief	
Anacin 68%	Bayer 54%	Anacin 79%	Bayer 65%	Anacin 65%	Bayer 57%	Anacin 64%	Bayer 49%
Gives Long Lasting Relief 67%	53%	Believes Pain for Long Period 64%		Long Lasting 58%	57%	Gives Longer Lasting Relief 41%	15%
Good for Severe Headaches 75%	48%	Good for Severe Headaches 64%	52%	Good for Severe Headaches 60%	47%	Good for Severe Headaches 45%	40%
Strong 11%	19%	Very Strong Product 5%	3%	Extra Strength 10%	21%	Is Extra Strength 26%	12%
				Strong 16%	25%		
Gives Complete Relief 58%	51%			Gives Complete Relief 53%	58%		

1/ CX 1058478, Z480, Z485, Z486, Z490; Rose, Tr. 2190-97. Dr. Rose's analysis was based upon the responses of males and females. The percentages displayed above simply combine these responses into a total percentage for Anacin and Bayer users.

2/ CX 4547148, Z149; Rose, Tr. 2055-60; Rosal, Tr. 1601-02.

3/ CX 1059214, Z217, Z221, Z229, Z233; Rose, Tr. 2190-97. See footnote 1, supra, regarding the meaning of these percentages.

4/ CX 4562221, Z222, Z225, Z226; Rose, Tr. 2080-82; Rosal, Tr. 1613-15.

[131]TABLE VI

Beliefs About Anacin and Bayer

Percentages Based Upon Non-Users Of Each Product

CX–454[1]		CX–455/56[2]	
1967		1970	
Relieves Pain Most Quickly		*Gives Fast Acting Relief*	
Anacin	Bayer	Anacin	Bayer
28%	26%	48%	41%
Relieves Pain for Long Period		*Gives Longer Lasting Relief*	
24%	21%	23%	18%
Very Strong Product		*Is Extra Strength*	
23%	15%	24%	12%
Good for Severe Headaches		*Good for Severe Headaches*	
30%	29%	28%	26%

[1] CX 454Z060, Z061, Z062, Z066, Z148, Z149; Ross, Tr. 2069–70; Rossi, Tr. 1601–02.
[2] CX 456Z221, Z222, Z225, Z226; Ross, Tr. 2078–80; Rossi, Tr. 1613–14.

524. CX 454 is the only one of the four studies conducted in 1967 and 1970 which permits a comparison of Anacin's image with that of an aspirin product other than Bayer. While Bayer ratings were included in the study and analyzed (Table V, *supra*), respondents were also asked to rate Norwich Aspirin on the same attributes as Anacin (CX 454F). The comparison of Anacin's image with that of Norwich again demonstrates the superiority of Anacin's image on all relevant pain relieving efficacy dimensions (Rossi, Tr. 1599–1600; Smith, Tr. 7650–52).

525. The results of CX 451, 452, 454 and CX 455, as shown in Table VII, *infra,* demonstrate that a significant number of Anacin users believed Anacin to be an effective tension reliever wholly apart from their beliefs concerning its efficacy in the relief of pain (Ross, Tr. 2217; Rossi, Tr. 1616–21). CX 457 serves to confirm this finding by showing that consumers had an image of Anacin as a tension reliever as late as the fall of 1975, the date this study was conducted. While only 1.4% of the respondents, or 11 individuals, surveyed in CX 457 selected Anacin as helpful for relieving tension, this figure may be explained by the fact that the tension answers were elicited in response to unaided, open-ended questions which usually tend to result in a lower level of response than aided, closed-ended questions. Furthermore, the 1.4% figure must be looked at in light of the fact that tension relief advertisements for Anacin ceased about December 1973 (Leavitt, Tr. 1316–24, 1422–23; Ross, Tr. 2233–34; CX 457X. See also F. 492, *supra*). **[132]**

TABLE VII

Ailments For Which Brands Are Useful

Percentages Based Upon Users Of Anacin

CX-454 1967 1/	CX-451 1967 2/	CX-452 1970 3/	CX 455/56 1970 4/
Good for Relieving Nervous Tension	Nervousness	Nervousness	Relieves Nervous Tension
41%	57%	45%	37%
Good for Pre-Menstrual Tension/Depression	Tension	Tension	
50%	72%	71%	
Good for Helping You Sleep	Sleep Problems	Sleep Problems	
26%	38%	27%	
	Depression	Depression	
	33%	28%	
	A Heavy Dragging Feeling	A Heavy Dragging Feeling	
	27%	20%	

1/ CX 454Z148; Ross, Tr. 2217-18; Rossi, Tr. 1616-17.
2/ CX 1058Z470, Z473, Z474, Z475; Ross, Tr. 2229-30. Dr. Ross' tesimony reported percentages of male and female Anacin users. The data above reflect a simple combination of those percentages into a single percentage for all Anacin users.
3/ CX 1059Z189, Z192; Ross, Tr. 2228-29. (See n. 2, supra).
4/ CX 456Z221; Rossi, Tr. 1617.

[133]526. Results from the *1969 Excedrin Study,* CX 462, show that, among Anacin users, 28% responded that they treat nervous tension with a pain reliever, and 73% of that 28% reported that they usually use Anacin to treat that symptom (CX 462Z052; Rossi, Tr. 1618–19).

527. Results from CX 454 and CX 455 also demonstrate that a significant number of Anacin non-users believed Anacin to be an effective tension reliever wholly apart from their beliefs concerning its efficacy in the relief of pain (Table VIII, *infra;* Rossi, Tr. 1615–16; Ross, Tr. 2217).

TABLE VIII

Ailments For Which Brands Are Useful

Percentages Based Upon Non-Users Of Anacin

CX–454 1967[1]	CX–455/56 1970[2]
Good For Relieving Nervous Tension	Relieves Nervous Tension
16%	26%
Good For Pre-Menstrual Tension and Depression	Good For Helping You Sleep
28%	14%

[1] CX 454Z072, Z073, Z075; Ross, Tr. 2218; Rossi, Tr. 1616–17.

[2] CX 456Z221; Ross, Tr. 2219; Rossi, Tr. 1617.

b. The Leavitt Study

528. Despite the fact that the study on *Public Beliefs About Selected Analgesic Products* ("The Leavitt Study"), CX 457, [134]is marred by serious flaws in its methodology (See Appendix I, pp. 8–10, *infra*) and analysis, it represents the best evidence available on consumers' current comparative images about the efficacy of Anacin versus aspirin (F. 504 and 505, *supra*).

529. The study contained no questions designed to determine the source of the images being measured nor did it attempt to measure the impact of advertising upon consumer beliefs relating to Anacin or aspirin (Leavitt, Tr. 1339, 1364–65, 1371). The study could easily have been designed to obtain this information; it is advisable for

researchers to ask such questions when they are attempting to relate advertising to image (Jacoby, Tr. 5247–48; Smith, Tr. 6039–40).

530. The most serious, major defect in the methodology of *The Leavitt Study* lies in the inadequacy of its response rate. The response rate in CX 457 was only about 50% (F. 505, *supra;* Appendix I, p. 9), meaning that just one-half of all of the interviews attempted were successfully completed.

531. Respondents' expert witness, Dr. Jacoby, testified that well done commercial telephone surveys should have response rates of approximately 75% (Jacoby, Tr. 4276). The minimum response rate generally required in government survey work, absent special justification, is 75% (Maisel, Tr. 4081). Even complaint counsel's expert, Dr. Rossi, felt that the response rate of the Leavitt survey was not as high as he would have liked it to be (Rossi, Tr. 1726).

532. As the "non-response" rate increases, the reliability of the survey results diminishes because of the increase in non-response bias (Rossi, Tr. 1623, 1726; Maisel, Tr. 4800; Jacoby, Tr. 5274, 5276).

533. Generic aspirin was used as the standard reference term against which Anacin and the other analgesics studied in CX 457 were compared (Leavitt, Tr. 1354; CX 457B).

534. Dr. Leavitt testified that he chose to compare generic aspirin against Anacin because of aspirin's common usage and its use in Anacin advertising as a measure for comparisons (Leavitt, Tr. 1354–56, 1357–58, 1361–71).

535. However, it is impossible to know how consumers understood the term "aspirin" and, according to Dr. Leavitt, many of them could well have understood the term to mean any number of analgesic products, many of which are not even aspirin (Leavitt, Tr. 1356, 1364–69; Rossi, Tr. 1638; Jacoby, Tr. 5244–45). **[135]**

536. A comparison of three nationally distributed and trademarked products with a generic product has the inherent effect of causing the national brands to be rated higher than the generic brand. All of complaint counsel's marketing witnesses conceded that there is a universal favorable bias among consumers towards national brands as compared to store brands or generic brands (Leavitt, Tr. 1358, 1361–62; Rossi, Tr. 1639; Ross, Tr. 2481).

537. Nonetheless, there are intrinsic problems in the use of either store brands, generic brands or national brands, such as Bayer, as the standard of comparison for Anacin (F. 509 and 510, *supra*). It is reasonable to conclude that, by choosing generic aspirin, Dr. Leavitt chose the best available product against which to compare Anacin.

538. Dr. Leavitt did not rotate the attributes in the questionnaire

design; each attribute appeared in each position an equal number of times. For example, "effectiveness" should have been the first attribute about which respondents were asked 25% of the time, "speed" should have been the first attribute about which respondents were asked 25% of the time, etc. Failure to rotate the attributes may create additional bias (Maisel, Tr. 5036–37; Jacoby, Tr. 5263–65).

539. Another source of potential bias is found in Dr. Leavitt's failure to provide the respondent with a neutral reply option on the rating scale. Dr. Leavitt utilized an admittedly unbalanced four-point rating scale with three positively worded steps ("extremely," "very" and "fairly") and one negatively worded step ("not") (CX 457E). This created the possibility of agreement response bias by forcing people to take a position which did not necessarily coincide with their views (Jacoby, Tr. 5525–59, 5430).

540. Dr. Leavitt justified his choice of a rating scale by making the observation that people tend to rate everything more positively than negatively. A four-point scale skewed towards the positive side will allow for more differentiation among positive answers, and will provide the maximum range of choices for most respondents (Leavitt, Tr. 1279; CX 457E–F).

541. Dr. Leavitt assumed that the four steps on the rating scale he utilized were equidistant from one another. He made no independent effort to determine if people, in fact, understood them to be at equal intervals from one **[136]**another (Leavitt, Tr. 1435–46). However, based upon prior experience with such scales, it is reasonable to assume that the four steps were about at equal intervals from one another (Leavitt, Tr. 1425–26. See also Rossi, Tr. 1651–53).

542. From the base of 780 respondents who were interviewed, approximately 98% had heard of all of the four products being surveyed. Dr. Leavitt did not analyze the 17 respondents, or 2%, who were not aware of all of the products involved in the study (Leavitt, Tr. 1229). The exclusion of these 17 respondents did not affect the reliability of Dr. Leavitt's analysis (Leavitt, Tr. 1295; Smith, Tr. 6050).

543. The presentation of *The Leavitt Study* data rests upon a simple comparison of each respondent's ratings of Anacin and aspirin: a respondent was held to have a comparative image of Anacin and aspirin if, and only if, he or she rated both products. Thus, each respondent who rated both products rated Anacin superior, equal or inferior to aspirin in terms of pain relieving efficacy. The total number of respondents in each of these three

categories is simply a matter of adding together the data in CX 457Z012, Z013 and Z014 (Leavitt, Tr. 1305–07).

544. Dr. Leavitt chose to utilize absolute, rather than comparative, questions even though the objective of his study was to ascertain what comparative images, if any, existed concerning Anacin and aspirin (Leavitt, Tr. 1272–73). His reasons for so doing were that it would be easier to detect statistically significant differences between absolute answers, it would be easier to control for response error and other accidental factors, and the respondents would be less likely to deduce the purpose of the survey (Leavitt, Tr. 1274–75, 1400).

545. Tables IX, X and XI, *infra,* present the results for all 780 respondents interviewed in *The Leavitt Study.* It was the opinion of respondents' expert marketing witnesses that, based upon these tables, the images of Anacin and aspirin are essentially identical whether one looks at the top one, top two, top three or all four boxes (Maisel, Tr. 4987–89, 4998, 5018–20; Smith, Tr. 6045–70; Blattberg, Tr. 6909; Kuehn, Tr. 6370–71; Sen, Tr. 7169). **[137]**

TABLE IX

RATINGS OF "EFFECTIVENESS FOR RELIEVING PAIN"

BASED ON TOTAL RESPONDENTS INTERVIEWED */

	Aspirin %	Anacin %
Extremely effective	7.4	9.2
Very effective	19.9	19.9
Fairly effective	42.2	32.2
Not effective	9.7	3.6
Don't know	20.8	35.1
BASE: 780		

*/ In his analysis, Leavitt eliminated 17 of these respondents who claimed that they were not aware of all four of the products surveyed, but who had given ratings to each of the products' (F. 542, supra).

Source: RX 108A.

NOTE: This table was developed from the underlying data collected in the Clark Leavitt/Gallup Organization study, Public Beliefs About Selected Analgesic Products (CX 457).

TABLE X

RATINGS OF "STRENGTH FOR RELIEVING PAIN"

BASED ON TOTAL RESPONDENTS INTERVIEWED */

	Aspirin %	Anacin %
Extremely high	6.4	6.3
Very high	12.8	18.1
Fairly high	40.1	32.4
Not high	16.5	5.9
Don't know	24.1	37.3
BASE: 780		

*/ In his analysis, Leavitt eliminated 17 of these respondents who claimed that they were not aware of all four of the products surveyed, but who had given ratings to each of the products (F. 542, supra).

Source: RX 108B.

NOTE: This table was developed from the underlying data collected in the Clark Leavitt/Gallup Organization study, Public Beliefs About Selected Analgesic Products (CX 457).

TABLE XI

RATINGS OF "SPEED IN RELIEVING PAIN"
BASED ON TOTAL RESPONDENTS INTERVIEWED */

	Aspirin %	Anacin %
Extremely fast	4.9	7.3
Very fast	13.3	17.2
Fairly fast	42.6	30.0
Not fast	17.8	7.8
Don't know	21.4	37.7
BASE: 780		

*/ In his analysis, Leavitt eliminated 17 of these respondents who claimed that they were not aware of all four of the products surveyed, but who had given ratings to each of the products (F. 542, supra).

Source: RX 108C.

NOTE: This table was developed from the underlying data collected in the Clark Leavitt/Gallup Organization study, Public Beliefs About Selected Analgesic Products (CX 457).

[140]546. When standard statistical tests of significance are applied, none of the differences shown in Tables IX, X and XI, *supra,* for the base of all 780 respondents interviewed, are statistically significant at the 95% confidence level (Maisel, Tr. 5018–20; Smith, Tr. 6046–51; Blattberg, Tr. 6914–15).

547. Dr. Leavitt not only omitted from his tabulations individuals who responded "Don't Know" to both products, but also omitted individuals who had given ratings to either Anacin or aspirin and answered "Don't Know" to the other. Whenever a respondent was unwilling or unable to rate a product on the four-point scale presented to him in Questions 2 through 5, the interviewer was instructed to code "Don't Know" on the questionnaire (Leavitt, Tr. 1292–93; CX 457W).

548. Pretesting of the questionnaire had disclosed that some respondents might be unwilling to rate a product because they did not personally use it (Crespi, JTr. 2270). The questionnaire had been modified to address this possibility by changing the preamble to Questions 2 through 5 to, "Whether or not you have ever used them . . . ."

549. One effect obtained by Dr. Leavitt by omitting the "Don't Knows" from the tabulations was an inflation of the percentage of people rating Anacin in the higher categories (Kuehn, Tr. 6289; RX 203, 204A, 205A and B, 206A and B and RX 207A and B). This result is attributed to the fact that there were approximately 100 more people who rated Anacin "Don't Know" than rated aspirin "Don't Know" (Table XIV, *infra*; RX 108A; Leavitt, Tr. 1475).

550. Fifty-eight percent (58%), or 446, of the 763 respondents rated both Anacin and aspirin on their effectiveness for pain relief. Fifty-six percent (56%) rated both products on their pain-relieving speed and strength (Table XIII, *infra*). These respondents have a comparative image of Anacin and aspirin on those attributes that they rated. The remainder, 42% to 44%, of the 763 respondents did not rate one or both products on these attributes; their failure to do so indicates the absence, on their part, of a comparative image of Anacin and aspirin as measured on the four-point scale (Leavitt, Tr. 1312; Rossi, Tr. 1582; Ross, Tr. 2050–51, 2198–99; Maisel, Tr. 5186–87; Smith, Tr. 7721).

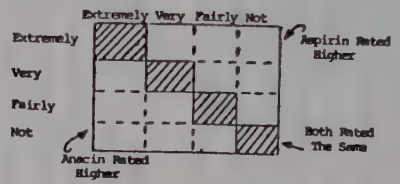
551. Table XII, *infra,* presents the data for those people that did, and those that did not, have a comparative image of Anacin and aspirin. The percentages in each row represent independent groups of respondents and each response appears only once in each row (Crespi, JTr. 2352). Dr. Leavitt testified that these percentages are reasonably projectable to the population of adults who live in homes

with telephones and who are aware of these products (Leavitt, Tr. 1307; Appendix I, p. 9 *infra*). At the 95% level of confidence, given a sample of approximately 750 people, the percentages could vary by approximately plus or minus 4% (Crespi, JTr. 2346–47; CX 1048C, Table A). **[141]**

TABLE XII

	Had Comparative Image			Did Not Have Comparative Image			
	Rated Both Products			Did Not Rate Both Products			
	Rated Anacin Higher Than Aspirin	Rated Anacin Equal to Aspirin	Rated Anacin Lower Than Aspirin	Did Not Rate Either Product	Rated Aspirin Only	Rated Anacin Only	Total
Effectiveness	16.3%	38.3%	3.9%	14.5%	6.4%	20.6%	763=100%
Speed	19.8%	31.7%	4.5%	15.1%	6.6%	22.4%	763=100%
Strength	17.6%	34.1%	4.5%	17.7%	6.6%	19.7%	763=100%

Definitions:



Source: CX 457Z012, Z013, Z014 (Leavitt, Tr. 1302-07).

[142]552. Analysis of the data presented in Table XII, *supra,* reveals that in excess of 40% of the respondents answered "Don't Know" concerning the nationally advertised analgesics. This 40%-plus figure looms even larger in light of the fact that the "Don't Know" response was not read to the respondent and, thus, required an unaided, affirmative act on the part of the respondent to be so classified (Leavitt, Tr. 1447–48; Maisel, Tr. 4987–89; Kuehn, Tr. 6790–91).

553. Table XIII, *infra,* presents the breakdown of *The Leavitt Study's* results in terms of percentages of the limited base of people who rated both products.

TABLE XIII

Percentages Based On Those Who Rated Both Products

	I. Rated Anacin Higher Than Aspirin	II. Rated Both The Same	III. Rated Aspirin Higher Than Anacin	Total
Effectiveness	27.8%	65.5%	6.7%	446=100%
Speed	35.4%	56.8%	8.0%	427=100%
Strength	31.3%	60.7%	7.9%	428=100%

Source: CX 457Z012, Z013, Z014.

554. The percentages in Table XIII, *supra,* are related to that subgroup of the sample who had a comparative image of Anacin and aspirin. Therefore, the figures are not technically projectable, in a statistical sense, to the general population (Maisel, Tr. 4799, 4829, 5019–20, 5187; Kuehn, Tr. 6280–81, 6708–11, 6792; Blattberg, Tr. 6906–08; Sen, Tr. 7174, 7400–01, 7403–05, 7414). However, Dr. Leavitt and respondents' expert witness, Dr. Smith, testified that these percentages are reasonably projectable to the population of adults in telephone households who are aware of both products and have a comparative image of them (Leavitt, Tr. 1409; Smith, Tr. 7718–20). [143]

555. Moreover, respondents' experts did concede that *The Leavitt Study* results are of some limited value, such as for diagnostic purposes (Kuehn, Tr. 6708–09, 6749–50; Sen, Tr. 7174, 7309, 7404–05). Dr. Maisel, also one of respondents' expert witnesses, admitted that studies such as *The Leavitt Study* are often used in making important business decisions despite their defects (Maisel, Tr. 5168–69).

556. Many of the 763 respondents did not rate either Anacin or aspirin on a particular attribute; many rated aspirin only, and some Anacin only. The breakdown of these respondents is presented in Table XIV, *infra.*

TABLE XIV

	Didn't Rate Either Product	Rated Aspirin Only; Didn't Rate Anacin	Rated Anacin Only; Didn't Rate Aspirin	Total
Effectiveness	111	157	49	317
Speed	115	171	50	336
Strength	135	150	50	335

Source: CX 618, 621 and 624; RX 201 and RX 202 (Leavitt, Tr. 1471–75).

557. Of the 173 respondents, 124 rated Anacin higher than aspirin on the four-point scale in terms of effectiveness for relieving pain. One hundred fifty-one rated Anacin higher than aspirin on pain relieving speed. One hundred thirty-four rated Anacin higher than aspirin on pain relieving strength Table XV, *infra.*

TABLE XV

	Rated Anacin Higher	Rated Anacin=Aspirin	Rated Aspirin Higher	Total
Effectiveness	124	292	30	446
Speed	151	242	34	427
Strength	134	260	34	428

Source: CX 457Z011, Z012, Z013 (Leavitt, Tr. 1305–07; Rossi, Tr. 1576). [144]

558. Tables XII–XV (F. 549–57, *supra*) are premised upon three assumptions which were shown to be correct. The first assumption is that consumers who rated Anacin and aspirin were using the rating scale ordinally in the sense that they viewed an "extremely" rating as higher than a "very" rating, and so on down the scale (Leavitt, Tr. 1303–04). This assumption remains undisputed and was implicitly accepted by respondents' experts (Maisel, Tr. 5118; Jacoby, Tr. 5433; Smith, Tr. 7726). The second assumption is that unless a respondent actually rated a product, one could not reasonably infer that the respondent had an image of that product (Leavitt, Tr. 1312; Rossi, Tr. 1582; Ross, Tr. 2207). This assumption is supported by the testimony of respondents' expert witnesses (Maisel, Tr. 5186–87; Smith, Tr.

7721). The third, and final, assumption is that Gallup's sampling procedures have been adequate and its results generalizable within certain limits. While the procedures were not completely randomized at each and every step of the sampling process, it is reasonable to conclude that the data generated are generally reliable.

559. Of the 763 respondents, 297 used neither Anacin nor aspirin, while 115 used both Anacin and aspirin. These two sets of respondents constitute two subsamples whose results can be analyzed separately to confirm the conclusions drawn from the analysis of the total sample of respondents presented in F. 566 and 567, *infra.* The results of *The Leavitt Study* for non-users are presented in Tables XVI and XVII, *infra,* and the results for users are presented in Tables XVIII and XIX, *infra.* [145]

TABLE XVI

297 Respondents Who Used Neither Anacin Nor Aspirin

	Rated both products			Did not rate both products		
	Rated Anacin Higher Than Aspirin	Rated Anacin Equal to Aspirin	Rated Aspirin Higher Than Anacin	Did not rate either product	Rated Aspirin Only	Rated Anacin Only	Total
Effectiveness:	12.8%	35%	1.3%	33%	13.1%	4.4%	297-100%
Speed:	16.8%	30.3%	1.7%	33%	13.8%	4.0%	297-100%
Strength:	14.1%	31.0%	2.0%	36.7%	11.4%	4.7%	297-100%

Source: RX 202.

TABLE XVII

Percentages Based On Non-Users Of Both Anacin And Aspirin Who Rated Both Products */

	Rated Anacin Higher	Rated Both The Same	Rated Aspirin Higher	Total
Effectiveness:	26.0%(38)	71.2%(104)	2.7%(4)	146=100%
Speed:	34.5%(50)	62.1% (90)	3.4%(5)	145=100%
Strength:	29.6%(42)	64.8% (92)	4.2%(6)	142=100%

*/ The figures in parentheses represent the absolute numbers of respondents who fall within each category.

Source: Table XVI.

TABLE XVIII

115 Respondents Who Used Both Anacin And Aspirin

	Rated Both Products			Did Not Rate Both Products		
	Rated Anacin Higher Than Aspirin	Rated Anacin Equal to Aspirin	Rated Aspirin Higher Than Anacin	Did Not Rate Either Product	Rated Aspirin Only	Rated Anacin Only	Total
Effectiveness:	33.0%	57.4%	5.2%	1.7%	1%	1.7%	115=100%
Speed:	36.5%	47.0%	6.1%	5.2%	1%	4.3%	115=100%
Strength:	32.2%	53.9%	5.2%	4.3%	0%	4.3%	115=100%

Source: RX 202.

[148]TABLE XIX

Percentages Based On Users Of Both Anacin And Aspirin Who Rated Both Products*

	Rated Anacin Higher	Rated Both The Same	Rated Aspirin Higher	Total
Effectiveness:	34.5%(38)	60% (66)	5.5%(6)	110=100%
Speed:	40.8%(42)	52.4%(54)	6.8%(7)	103=100%
Strength:	35.2%(37)	59.0%(62)	5.7%(6)	105=100%

* The figures in parentheses represent the absolute numbers of respondents who fall within each category.

Source: Table XVIII.

560. Another way to assess the comparative images of Anacin and aspirin is to analyze the date on an aggregate, rather than on an individual, basis. This mode of analysis is based on whether the distribution of all respondents' ratings of Anacin is higher than, equal to or lower than the distribution of all respondents' ratings of aspirin. This method leads to the conclusion that the sample on an aggregate basis believed that Anacin was superior, equal or inferior to aspirin (CX 457Z001, Z002, Z003; Rossi, Tr. 1577).

561. A most conservative application of this aggregate analysis involves comparing the distribution of ratings of Anacin and aspirin by the subsample of respondents who rated both products but who had not used Anacin for at least six months prior to the survey. Analysis of this subsample is conservative because it removes from the analysis those respondents who are most likely to have a favorable image of Anacin, while retaining those most likely to have a favorable image of aspirin (Ross, Tr. 2203–04; Smith, Tr. 5954–55, 5957–58). In examining this admittedly biased subsample (biased in favor of aspirin), Anacin is still rated as more effective than aspirin. This analysis confirms the essential conclusion that Anacin is believed to be superior to aspirin within the population of those who have an opinion about both (Ross, Tr. 2199–2201; CX 631; Smith, Tr. 7726–27). [149]

562. Another type of aggregate analysis of the comparative beliefs of respondents who rated, and therefore had an image of, both products is reflected in the combined average ratings presented by Dr. Leavitt in CX 457Z009. A combined average rating has the virtue of reducing the aggregate distribution of ratings to single numbers for each product, which can be compared statistically. Such a statistical comparison shows that Anacin's average rating on all three attributes is significantly higher than aspirin's, and confirms

once again the overall conclusion to be drawn from the study: significant numbers of consumers believe Anacin is a more effective pain reliever than aspirin (Leavitt, Tr. 1308–11; Rossi, Tr. 1576).

563. The comparison of combined average ratings does not provide an independent foundation for the conclusion that Anacin has a superior image to aspirin because the calculation and comparison of average ratings for both products is a "parametric" statistical technique predicated upon certain assumptions about the nature of the respondents' ratings (Leavitt, Tr. 1498–99; Rossi, Tr. 1652–53; Ross, Tr. 2209–10; Jacoby, Tr. 5260). The primary assumption is that respondents used the four-point scale as an "equal interval" scale (Ross, Tr. 2062). In other words, it is assumed that they believed not only that "Extremely" was higher than "Very," and so on (an "ordinal" relationship), but also that the difference between "extremely" and "very" was the same as that between "very" and "fairly" and between "fairly" and "not" (Leavitt, Tr. 1435–38). If the equal interval assumption is satisfied, then it is appropriate to assign equal numeric intervals (*e.g.,* 3, 2, 1, 0) to the verbal anchors on the four-point scale, which then permits an adding and averaging of the ratings. Satisfaction of the assumption of "equal intervals" depends on how respondents perceived the scale, a perception that was not investigated in *The Leavitt Study* (Leavitt, Tr. 1436). However, the conclusion that the "equal interval" assumption was satisfied is reasonable (F. 541, *supra*).

564. Given the substantial size of the sample that was analyzed in this statistical comparison of average ratings and the equal interval characteristics of the four-point scale, it is reasonable to conclude that Anacin received higher ratings than aspirin whether or not one compared the averages or simply compared the aggregate distributions (Ross, Tr. 2210).

565. The analyses of *The Leavitt Study* data that are presented in F. 550–64, *supra,* focus on those respondents who rated both Anacin and aspirin because only this group can unequivocally be said to have a comparative image of the two **[150]**products (F. 543, *supra*). For example, the 157 respondents who rated aspirin on effectiveness but who did not rate Anacin on effectiveness (Table XIV, *supra*) did not hold a comparative image of the two products on that attribute and, therefore, did not meet the essential criterion for Dr. Leavitt's analysis (Leavitt, Tr. 1311–12) nor for the analyses presented in F. 550–64, *supra.* The other respondents either rated only one product or rated neither product. Nevertheless, their ratings of aspirin can be examined (CX 629A, B, C). Similarly, the ratings of those who rated Anacin on any attribute, without regard to whether they rated

aspirin, can be examined (CX 629A, B, C). However, this is not a rational basis upon which to compare images because, by definition, it includes those who did not have a comparative image of the two products (Rossi, Tr. 1582; Ross, Tr. 2205–08).

566. Despite these limitations, the ratings of Anacin among all respondents who rated it (regardless of whether they rated aspirin) were compared to the ratings of aspirin among all respondents who rated it (regardless of whether they rated Anacin). Respondent's own expert, Dr. Smith, agreed that Anacin's ratings on this basis were higher than aspirin's (Smith, Tr. 7724–27). When those ratings were averaged, Anacin's average ratings still were higher than aspirin's (Rossi, Tr. 2148). Even when all the ratings of Anacin, by both users and non-users, were compared with all the ratings of aspirin, by both users and non-users, Anacin's ratings were higher (Ross, Tr. 2205–07).

567. *The Leavitt Study* (CX 457) shows that a significant number of American consumers believe that Anacin is a more effective pain reliever than aspirin.

3. *Conclusion*

568. The five consumer research studies, CX 451, 452, 454, 455 and 457, and the experts' testimony, demonstrate that it is reasonable to infer that a significant number of consumers have an image of Anacin as a product that is more effective for the relief of pain than aspirin.

569. When looked at as a whole, the studies carried out during the period 1967 to 1970 (CX 451, 452, 454 and 455), confirm this conclusion despite different methodologies and sampling designs. Respondents' expert, Dr. Joseph Smith, testified that the consistency in the findings of these studies adds considerably to the credibility of their results (Smith, Tr. 5950). [151]

570. However, none of the 1967 to 1970 commercial studies permits a conclusion as to whether the individual consumers surveyed believed that Anacin was more effective than aspirin (or Bayer). They merely permit an inference that some proportion of the sample surveyed had a specific image of Anacin and that some proportion had a specific image of aspirin (or Bayer). Thus, these studies provide a basis for an inference regarding the nature and the extent of the comparative images among the consumers surveyed

(Ross, Tr. 2059–60), and confirm the essential findings of *The Leavitt Study* (CX 457).[9]

571. A significant number of consumers have an image of Anacin as a product that will relieve nervousness, tension, stress, fatigue and depression and will enable persons to cope with the ordinary stresses of everyday life (F. 525–27, *supra*).

572. Although no specific evidence was introduced to show that consumers have an image of APF as a product that will cause gastric discomfort less frequently than aspirin, it is reasonable to infer from the representations made in the advertisements disseminated for APF and from consumers' understanding of those representations (F. 181–85, *supra*) that a significant number of consumers have an image of APF as a product that will cause gastric discomfort less frequently than aspirin.

573. No evidence was presented to show that either of the images consumers have of Anacin and APF (as stated in F. 568 and 572, *supra*) was also an establishment image (F. 485 and 487, *supra*).

574. It is not reasonable to infer from the record evidence that consumers held an image that:

(a) it has been established that Anacin is more effective for the relief of pain than aspirin; or that

(b) it has been established that Arthritis Pain Formula will cause gastric discomfort less frequently than aspirin. **[152]**

575. However, it is reasonable to infer from the representations made in advertisements disseminated for Anacin and APF, taken together with the inferential conclusions presented in F. 568 and 572, *supra*, that consumers held the images referred to in F. 483 (a) and (b), *supra*. These inferential conclusions are implied as a matter of law.[10]

C. *The Source Of Consumer Images Of Anacin*

576. The record enumerates some of the multitude of factors that play a role in the creation of consumer beliefs and images about a product. Some of these factors are advertising, experience based on prior product usage, word-of-mouth communications, recommendation by doctors, price, packaging, brand name and the store where the product is purchased (Ross, Tr. 2238–39, 2577–84; Smith, Tr. 6079–81; Jacoby, Tr. 5486–87; Sen, Tr. 7170).

[9] In this manner, it is suggested that consumers' images of Anacin have been stable through significant periods of time (See Section VII D).

[10] Therefore, the two establishment images will not be discussed in the two sections that follow (Sections VII C and D), dealing with source and duration of images, respectively.

577. It is generally agreed that advertising, experience based on usage and word-of-mouth communications are the three major sources of images (Ross, Tr. 2239; Smith, Tr. 7732; Jacoby, Tr. 5487–88). However, experts recognize that word-of-mouth communications are essentially a derivative factor, dependent upon both advertising and prior product usage (Ross, Tr. 2238; Jacoby, Tr. 5490; Sen, Tr. 7327–28; Smith, Tr. 7732). Thus, advertising and product usage are the two most important sources of consumers' images of products (Ross, Tr. 2239).

578. Advertising also plays an important role in creating and helping to foster awareness of a brand, in creating expectations about how the product will perform and in generating initial trial of the product (Jacoby, Tr. 5292, 5406, 5489).

579. A consumer's initial trial of a product is often explained by the consumer's perception of how the product will perform; these expectations are often generated by advertising (Sen, Tr. 7330–31; Smith, Tr. 7735–36). Consequently, every time a consumer uses a product, that usage experience interacts with the expectations that were created by advertising (Ross, Tr. 2269–70, 2701–02; Jacoby, Tr. 5407; Smith, Tr. 7745). **[153]**

580. Over a period of time, specific claims contained in an advertisement tend to merge with a consumer's beliefs about the product. This proposition remains true even though the consumer may subsequently forget the specific content of those advertising claims (Ross, Tr. 2045, 2689–91; Smith, Tr. 7437). Thus, if a general theme of an advertising campaign is reiterated over time, the product image relating to that theme will endure despite the likelihood that consumers will have forgotten the specific content of previous advertisements directed to that product claim (Smith, Tr. 6108–09; Kuehn, Tr. 6681–82).

581. The importance of usage experience as a source of comparative product image becomes significantly lessened with respect to a product class such as OTC analgesics, where consumers are unable to make an objective evaluation of how the products perform. In this instance, the relative importance of advertising as a primary source of comparative product image is enhanced accordingly (Ross, Tr. 2246–49, 2255–57, 2613–17, 2703–05; Sen, Tr. 7330–31; Smith, Tr. 7745).

582. In the case of OTC analgesic products, a consumer's ability to objectively evaluate the products' pharmacological performance is greatly reduced by the consumer's expectations of performance resulting from exposure to advertising, the placebo effect, the subjective nature of pain in general and minor pain in particular,

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and by the fact that each pain experience is different for the consumer at a given time and place. The consumer is, thus, unable to effectively evaluate the comparative pharmacological performance of OTC analgesic products when he or she knows the products being taken (*i.e.*, on an unblinded basis) (F. 210, 211, 218–20, 223 and 225).

583. The essential inability of consumers to evaluate the comparative pharmacological performance of analgesics must be distinguished from the fact that consumers continually form subjective judgments or perceptions concerning product performance. Consumers' subjective perceptions of superior performance, however, are unreliable due to the fact that consumers know the product that they are taking. Consequently, all their expectations about the performance of that product are called into play as they form their subjective perceptions of how the product is working for them. These expectations are continually fueled by advertising (Ross, Tr. 2239–41, 2271, 2276, 2278).

584. Usage experience with OTC analgesic products does not serve, in a true sense, to disconfirm consumers' expectations of how the products will perform. Therefore, [154]in the case of OTC analgesic products, usage, more often than not, tends to reinforce the initial product image induced by advertising (Ross, Tr. 2250, 2269–77; Jacoby, Tr. 5449, 5453–55; Blattberg, Tr. 7055–56; Smith, Tr. 7782).

585. The record shows that American Home spent approximately $210 million between 1960 and 1970, advertising Anacin to consumers as a product superior to aspirin in relieving pain and as a tension reliever. During the period 1968 to 1970, Anacin's advertising-to-sales ratio was approximately 37% (CX 611Z157).

586. American Home's presentation of Anacin in advertising as a more effective pain reliever has consistently emphasized speed, extra ingredients, more pain reliever and similar indicia of superior pain relieving performance. For example, respondents' witness, George DeMott, the President of Whitehall Laboratories, testified that American Home has been making an extra strength claim for Anacin since 1967 (DeMott, Tr. 4748; CX 306B; CX 314A).

587. Advertisements disseminated between 1963 and 1973 had consistently portrayed Anacin as effective for tension relief and for helping people cope with the ordinary stresses of everyday life (CX 611).

588. The record also shows that the public has perceived and understood American Home's superiority and tension relief claims in the advertisements for Anacin (F. 66–170, *supra*). The ASI copy tests in evidence confirm that a significant number of consumers

perceived superior efficacy claims and tension relief claims in the advertisements they viewed (F. 67, 86, 101, 110, 117, 133 and 157, *supra*). The advertising penetration studies show that superior efficacy and tension relief claims were being recalled by consumers off the top of their heads (F. 500, *supra*). The consumer image studies consistently show across time, method and sample that a significant number of consumers believe Anacin to be a more effective pain reliever than aspirin (F. 568–70, *supra*).

589. The consumer research comparing Anacin and aspirin has remained generally stable over the years (F. 502, 503, 569 and 570, *supra*). The record indicates that product usage, as a source of product image, is substantially influenced by advertising (F. 578–79 and 584, *supra*).

590. The record also indicates that the role of usage experience, as a source of product image, is significantly diminished in the case of OTC analgesic products (F. 581–82, *supra*). [155]

591. In light of these circumstances, it is concluded that advertising has played a substantial, and perhaps the most important, role in the creation and maintenance of consumers' beliefs and images of Anacin as a pain reliever superior to aspirin and as an effective tension reliever.

D. *The Duration Of Advertising Effects*

592. Experts for both parties testified that consumers' recall of specific copy points for advertising themes made in Anacin advertising (*i.e.,* penetration of advertising) will endure for a period of from three to nine months after those claims have been made (Ross, Tr. 2261–62; Smith, Tr. 6086–88; Blattberg, Tr. 7116–20; Sen, Tr. 7181). However, beliefs and images concerning attributes stressed in advertising for Anacin can endure long after the specific information that led to their formation has been forgotten (Ross, Tr. 2261–63; Jacoby, Tr. 5482; Kuehn, Tr. 6681–82; Smith, Tr. 7755; F. 580, *supra*).

593. The durability of consumers' beliefs and images of Anacin as a superior pain reliever and as an effective tension reliever depends upon various factors such as the types of beliefs and images, their importance or salience to consumers, whether they relate to a general favorable opinion of Anacin or to a narrow aspect of its performance and whether the consumers who hold these beliefs are users of Anacin (Ross, Tr. 2258–59, 2264–67; Jacoby, Tr. 5449–55, 5479–80; Smith, Tr. 6094–96, 7768, 7777–81).

594. The record contains evidence that, even if respondents were to cease disseminating advertising claims that Anacin is a more effective pain reliever than aspirin and that it is effective for the

relief of tension, images of Anacin on those attributes would persist in the minds of consumers who did not use the product for approximately one year after those claims ceased (Ross, Tr. 2258–59, 2266; Smith, Tr. 6088, 7774–75). The one year estimate of duration among non-users is based upon professional experience. Dr. Ross's opinion was based, in part, upon his review of literature showing that a substantial number of consumers still have images of some products 20 years after those products have gone off the market (Ross, Tr. 2260, 2265).

595. On the other hand, images of Anacin's superior efficacy and tension relieving efficacy will persist among Anacin users for a period longer than one year because such usage will continually reinforce their images (Ross, Tr. [156]2266–67; Jacoby, Tr. 5449–55; Smith, Tr. 6094–96, 7768, 7782, 7821; F. 584, *supra*).

596. Once a consumer has begun to perceive that Anacin is more effective than aspirin and that it relieves tension, and once these beliefs have become a part of the consumer's image of Anacin, these beliefs lose their functional connection with the information that originally generated them (Ross, Tr. 2267).

597. The record, as a whole, shows that until and unless new information is provided to consumers about Anacin that corrects or modifies these beliefs, the beliefs and images will endure for a long period of time because consumers' usage experience with Anacin will not serve to disconfirm the beliefs (Ross, Tr. 2267–71; F. 584, *supra*). On the contrary, each time consumers use Anacin, that usage tends to reinforce the expectations of consumers that advertising induced in the first place (Ross, Tr. 2269–70; Jacoby, Tr. 5453–55).

598. Respondents' expert witnesses, Drs. Blattberg and Sen, contended that a high degree of brand loyalty to Anacin among Anacin users (*i.e.*, a significant number of repeat purchases of the brand) was a prerequisite to a finding that usage reinforces consumers' images of the product, with those images having been substantially influenced by advertising (Blattberg, Tr. 6877, 6887–88; Sen, Tr. 7181–88). To shed light on this question, Drs. Blattberg and Sen prepared an analysis of the purchasing patterns in the analgesics market and the amount of brand switching that occurs (RX 176 through RX 185).

599. Their analysis of how consumers behave in the marketplace was based upon panel data, collected by means of consumer purchase diaries, which were supplied by NPD Research, Inc. ("NPD") (Johnson, Tr. 6136–40; Blattberg, Tr. 6823, 6830). One frequent use of such panel data is to examine brand switching behavior in given product categories (Johnson, Tr. 6151).

600. American Home purchased panels of data for two periods of time from NPD in 1977. One panel covered the period December 1970 to January 1973, with the exception of one missing month, May 1972. For the latter period, there were two panels which were not coterminous in length: one panel covered the period from July 1975 to May 1976, and the other panel covered the period from July 1975 to December 1976 (Johnson, Tr. 6149; Blattberg, Tr. 6831). [157]

601. Tod Johnson, president of NPD, testified that NPD collects data from two nationally representative panels which are demographically and geographically balanced through use of a stratified quota sample, and which consist of a minimum of 6500 reporting households per month (Johnson, Tr. 6140, 6143–45).

602. However, the sample selected by NPD is neither representative of the entire United States population nor a probability sample (Johnson, Tr. 6158–66). NPD contacts potential participants based upon lists compiled from telephone books or automobile registrations. Samples based on telephone books do not include unlisted numbers or people without telephones, while samples based on auto registrations do not include people without cars. Moreover, NPD's invitation to join a panel, which is mailed out to consumers, is rejected by 90% of those contacted. Of the 10% of the families contacted that do accept and respond, less than one-half actually become participants (Johnson, Tr. 6175–77).

603. RX 176 through RX 185 contain the results of Drs. Blattberg and Sen's analysis of two sets of NPD Panel Data on analgesics purchases by families. Neither these exhibits nor, therefore, the NPD data on which they are based include any information on the individuals who actually used the products purchased (Johnson, Tr. 6153–55; Blattberg, Tr. 6930).

604. RX 176 through RX 185 do not take into account several factors which can affect the conclusions which can be drawn about the purchase behavior of families participating in NPD's panels. Such factors, appropriate for analysis, include the size and composition of the participating families, the length of time that they participated, the sequence and mix of the brands purchased and the size of the purchase (Johnson, Tr. 6220; Sen, Tr. 7262, 7263–66; Blattberg, Tr. 6930–31).

605. In this proceeding, Drs. Blattberg and Sen adopted a stringent, narrow definition of brand loyalty: the exclusive, or virtually exclusive, usage of one brand over time (Blattberg, Tr. 6976; Sen, Tr. 7192, 7196). However, Dr. Blattberg also testified that there is much disagreement about the concept of loyalty to one brand versus multiple brand loyalty (Blattberg, Tr. 6978–79).

606. If the criterion for brand loyalty to a product were lowered from Drs. Blattberg and Sen's figure of 90% of consumer purchases being devoted to Anacin to 65%, for [158]instance, then 20% or more of the families who were heavy users of analgesics and who purchased Anacin would be deemed "loyal" to the product (RX 178 and RX 183. See also Sen, Tr. 7303–04, 7309–10; Blattberg, Tr. 6975, 7020, 7028–29).

607. Moreover, there is a category of consumers who may conveniently be called "national brand switchers." While these consumers are not loyal, in the conventional sense, to one brand, their purchase behavior is limited to switching among two or three national brands (Blattberg, Tr. 6959, 6978; Sen, Tr. 7266–70).

608. Dr. Blattberg testified that approximately one-third of those households on the panel who made more than one transaction during the panel period made two or three transactions (RX 180; Blattberg, Tr. 7024–25). Of those households with two or more transactions, and with Anacin representing at least one of those transactions, 67.5% purchased three or fewer brands during the 1970 to 1973 panel period (RX 180B) and 74.44% purchased three or fewer brands during the 1975 to 1976 panel period (RX 185B) (Blattberg, Tr. 7020–22). Of this same group of households, 10.17% were totally loyal to Anacin (*i.e.*, 100% of their purchases were of Anacin) during the 1970 to 1973 period (RX 180B), and 14.64% were totally loyal to Anacin during the 1975 to 1976 period (RX 185B) (Blattberg, Tr. 7028–29).

609. Given the tenuous worth of NPD data as well as the significant degree of brand loyalty either to Anacin or to a small, select group of national brands that would include Anacin, Drs. Blattberg and Sen's analysis of the panel data, presented in RX 176 through RX 185, does not materially weaken the conclusion that usage reinforces consumers' images of Anacin with those images having been substantially influenced by advertising (F. 584, 589 and 591, *supra*).

610. The evidence in the record shows that a pain reliever's attributes of efficacy, speed and strength are of central importance to users of OTC analgesic products. In CX 455, *A Study of Vanquish's Market Opportunities - 1970* , each of over one thousand consumers surveyed was asked to rate the desirability of 37 qualities in pain relievers (CX 455ZC25,Z123). The six qualities picked most often by the total sample of respondents as "extremely desirable" or "very desirable" were, in descending order, "Stops a headache," "Relieves pain," "Completely safe to take," "Provides quick relief," "Doesn't upset the stomach," and "Provides long [159]lasting relief" (CX

456Z058–Z060). A ranking of this kind is a method advocated by one of respondents' witnesses, Dr. Jacoby, to assess the importance or salience of beliefs (Jacoby, Tr. 5240–41, 5243–44). Four of the top six qualities relate to the pain relieving efficacy of analgesic products. Respondents' expert, Dr. Smith, agreed with this conclusion based on his analysis of responses to another question in CX 455 which asked respondents to list the reasons why they used their own brands most often. Those unaided responses confirm that the reasons associated with pain relieving efficacy, speed and strength are paramount in consumers' minds (Smith, Tr. 6026–28; CX 456Z344, Z345). For one OTC analgesic product to be regarded as superior to another along these important, yet general, dimensions strongly suggests that the belief will endure.

611. The record evidence also clearly shows that OTC analgesic users believe that tension relief is an important attribute of these products as a class. Over 50% of the group of regular analgesic users surveyed in CX 455 believed that "Relieves nervous tension" is an "extremely desirable" or "very desirable" attribute of an OTC analgesic product (CX 456Z059; Ross, Tr. 2223). Furthermore, an analysis of the heavy Anacin users surveyed in CX 451 and CX 452 discloses that substantial numbers of Anacin users felt that Anacin is useful for the treatment of nervousness, tension, depression and other mood related problems (Table XX, *infra.* See also RX 136, 137 and 138; Rossi, Tr. 1621).

TABLE XX

Percentage Of Anacin Users Who Feel Anacin Is Particularly Good For A Symptom

	1967*	1970**
Nervousness	58%	46%
Tension	72%	71%
Depression	33%	29%
Sleep Problems	39%	29%
A Heavy Dragging Feeling	30%	21%

* CX 1058Z470, Z473; Ross, Tr. 2229–30.
** CX 1059Z189, Z192; Ross, Tr. 2228–29. [160]

612. The record shows that Anacin's product image as an effective tension reliever is likely to endure for a long period of time

unless that image is corrected or modified by new advertising information (F. 596 and 597, *supra*).

E. *Conclusion*

613. "Corrective" information in advertising has been shown in experimental situations to be an effective means of altering or modifying consumer beliefs in performance attributes and images of products (Smith, Tr. 7770).

614. A general criticism of corrective advertising is that information disseminated in a corrective message will frequently have carryover, or spillover, effects. In other words, the corrective advertisement will invariably have an impact on images and beliefs other than those that are to be corrected and, perhaps, spread to other products of the manufacturer or to the general reputation of the manufacturer (Jacoby, Tr. 5310–13, 5458–62; Smith, Tr. 6102, 7773–74).

615. Respondents' expert witness, Dr. Jacoby, conceded that studies are divided on whether corrective advertising only affects the targeted belief or spreads beyond that belief to other, perhaps valid, beliefs (Jacoby, Tr. 5458–60, 5467).

616. In the setting of this proceeding, it is apparent that most consumers are not familiar with the name, American Home Products Corporation, and, thus, do not associate Anacin with American Home. However, the carryover effects of corrective advertising directed towards Anacin and APF may spread to other products that consumers perceive as associated with them (Smith, Tr. 6104–05).

617. The record as a whole supports the inference that a significant number of consumers believe APF to be a product which causes gastric discomfort less frequently than any other non-prescription internal analgesic (F. 572, *supra*), and that the existence of a substantial question regarding the scientific validity of this claim is a material fact to consumers.

618. Complaint counsel have established by a preponderance of credible evidence that Anacin has an image among a significant number of consumers as a product that is a more effective pain reliever than any other non-prescription internal analgesic and that this image will endure for a **[161]**long period of time (F. 568–70 and 597, *supra*). Complaint counsel, however, have not offered any evidence to show that consumers believe Anacin's superior efficacy is established by medical and scientific substantiation. In the absence of any direct evidence, complaint counsel's proposed corrective advertising provision directed towards Anacin's comparative efficacy claims must necessarily be based on the inference that the record

demonstrates the existence of an establishment image among consumers regarding Anacin's superior efficacy (F. 485, *supra*).

619. It is of course arguable that, since Anacin's comparative efficacy claims also carry implied establishment claims, the existence of Anacin's superior efficacy image among consumers is *ipso facto* a sufficient basis for the inference that there exists an establishment image among consumers and, further, that the establishment image is likely to endure unless altered or modified by corrective advertising. However, such a finding, in the absence of any direct evidence, is an inference based upon an inference (F. 574 and 575, *supra*).

620. The complaint in this proceeding does not allege that advertising claims of Anacin's superior efficacy and APF's superior safety lack a reasonable basis or are false (F. 15, *supra*). Rather, complaint counsel's proposed corrective advertising provision directed to Anacin's and APF's establishment images is based solely on the "substantial question" doctrine, a novel theory of Section 5 liability.

621. To require disclosure of the existence of a substantial question, a material fact, in future advertisements claiming the superior efficacy of Anacin or the superior safety of APF is one thing. To require corrective advertising grounded only upon the substantial question theory is another matter. It is the determination of the administrative law judge that, coupled with the considerations discussed in F. 619, *supra,* to impose such a radical form of relief as a corrective advertising requirement in this case would be fundamentally inequitable and inconsistent with administrative due process.

622. A corrective advertisement, for the purposes of this case, is a statement in an advertisement that will be understood by consumers to say that Anacin is not effective as a tension reliever. Consumers should be able to perceive the source of this new information to be at least as credible as the source of the original claims sought to be corrected (Ross, Tr. 2280–82). **[162]**

Discussion

The Meaning Of Advertisements—General Considerations

It is well established that the Commission, and an administrative law judge, may determine the meaning of an advertisement solely from an examination of what is contained therein, without consumer testimony or survey data as to how an advertisement is perceived by the consumer. The test is whether, after reviewing an advertisement in its entirety, an interpretation is reasonable in light of the claims

made in the advertisement. An advertisement may convey more than one claim, and the same claim may be susceptible of more than one interpretation by the consumer. If an advertisement is capable of conveying more than one impression to the consumer and any one of them is false, the advertisement may be found to be misleading. From its own review of an advertisement, the Commission may find impressions which the advertisement is likely to convey to the public, and determine whether such impressions have a tendency or capacity to deceive the public, even in cases where a number of consumers may testify that they were not actually deceived.[11] In determining the tendency and capacity of an advertisement to mislead, the Commission looks to the impression an advertisement may make on the gullible and unthinking rather than on the trained and sophisticated.[12] Indeed, the central purpose of Section 5 is "to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the world of commerce." *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).

In this connection, the unique impact of television commercials upon the audience deserves further discussion.

The revolutionary insight Marshall McLuhan has provided into contemporary mass communication is that "medium is the [163] message."[13] This epigram invites an understanding of the unique dimensions of today's mass-media communication. Today's printed and electronic mass communication does not aim to communicate classified data and fragments of information in the conventional sense as much as it stresses pattern recognition, in which visual and aural configurations serve as symbols. The "message" is not to be understood through the technical meaning of printed or spoken words or sounds as much as it is through recognition of the aural-visual pattern of the "medium" itself. At the risk of oversimplification, the message is recognized and understood through patterns of aural-visual symbols which are intended to evoke a desired imagery. A casual viewer of today's television commercials is struck by the element of essential truth in McLuhan's epigram. In my view, it is fair to say that, with respect to many television commercials that one encounters today, their evaluation is not complete when one stops at the meaning of their technical "content"—what the spoken words say. One needs to proceed to the "pattern" of symbols—what

[11] *E.g., Ford Motor Company*, 87 F.T.C. 756, 794–795 (1976), and the cases cited therein.

[12] *E.g., Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676 (2d Cir. 1944); *FTC* v. *Standard Education Society*, 302 U.S. 112, 116 (1937); *Exposition Press, Inc.* v. *FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *National Bakers Services* v. *FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Rodale Press, Inc.*, 71 F.T.C. 1184, 1237 (1971).

[13] See Marshall McLuhan, *Understanding Media* (1964); *The Medium Is The Message* (1967).

the commercial (medium) in its totality symbolizes to the psychic and social consciousness of the audience-viewer. The key to true understanding is not classification and differentiation of the spoken words or sounds, but the imagery evoked by the patterned aural-visual symbols.[14]

This observation appears to have particular application to a television commercial which projects a distinct pattern of compressed, fluid pictorial and aural images, submerging its technical "content" and appealing directly to the viewer's psychic and social consciousness. In a very real sense, the viewer's critical faculties of classification and differentiation are drowned in patterns of imagery and symbols. Thus it is possible that, in skilled and practiced hands, the spoken words of a television commercial may appear to say one thing, while its pictorial and aural imagery conveys to the psyche of the viewer-audience something quite different. This observation is of some importance in evaluating many of the television commercials reviewed in this proceeding. In my view, in evaluating many of the advertisements challenged in this proceeding, the conventional **[164]** wisdom of the psychology of learning is inadequate and needs to be complemented by the McLuhanian perspective. For example, this approach is especially suited to the evaluation of the television commercials involving the "tension relief" claim, which clearly depict situational tensions of various kinds that are distinguished from pain-associated tension.

In evaluating the meaning of individual advertisements, I have primarily relied on my knowledge and experience to determine what impression or impressions an advertisement as a whole is likely to convey to a consumer. When my initial determination is confirmed by the expert testimony of complaint counsel or respondents, I rested. When my initial determination disagreed with that of expert testimony, which was often conflicting, I reexamined the advertisement in question, and further considered such record evidence as the ASI copy tests[15] and verbatim responses[16] before reaching a final determination. In this connection, my determinations agreed in most instances with those of Dr. Ross, complaint counsel's expert, and

[14] Dr. Smith, respondents' consumer psychology expert, also noted the importance of the "symbolic" or "covert" message that is carried within an advertisement through color, environment and other devices (Smith, Tr. 7493–94).

[15] The ASI copy tests were conducted for and relied upon by American Home. (*E.g.*, CX 611Z155–Z156, CX 306, CX 327, CX 329; DeMott, Tr. 4755). In my view, although the test environment is somewhat artificial and does not purport to simulate the typical home-viewing environment, the ASI tests provide a valuable insight regarding the probable consumer perception of the copy points contained in test ads. See *American Home Products Corp.* v. *Johnson & Johnson*, 436 F. Supp. 785, 794 (S.D.N.Y. 1977), *aff'd* Nos. 77–7503, 7527 (2d Cir. May 1, 1978).

[16] The use of verbatim responses found in copy tests as an aid in determining the meaning of an advertisement is well established. *E.g.*, *Ford Motor Co.*, 87 F.T.C. 756, 779, 794 (1976); *Bristol-Myers Co.*, 85 F.T.C. 688, 706–12, 744–45 (1975).

disagreed with those of Dr. Smith in most instances. This is not surprising for a number of reasons.

First, Dr. Smith's focus was on what an advertisement claimed explicitly in its audio portion. Furthermore, Dr. Smith completely ignored what he calls a "symbolic" or "covert" message that may be carried within an advertisement through the depiction of an environment, the use of color and other non-verbal devices (Smith, Tr. 7493–94). **[165]**

Second, Dr. Smith's focus was further blurred by his seeming preoccupation with an advertiser's promotional campaign theme instead of evaluating each advertisement as a whole and individually (Smith, Tr. 7517–18). This is contrary to the law.[17]

Third, Dr. Smith's analysis was further flawed in that he attempted to gauge the message an advertisement may have carried to consumers in terms of the advertisements of American Home's competitors. (*E.g.*, Smith, Tr. 5649–51, 5703–06, 5775–78). This is contrary to the law.[18]

Fourth, before concluding that an advertisement contained an alleged claim, Dr. Smith appeared to require not only that the claim be perceived by consumers but also that it be retained by them for some definite period of time (Smith, Tr. 7437–39). However, "delayed recall measures consumer interest and advertising persuasiveness as well as message content."[19]

Fifth, Dr. Smith relied heavily on consumer research which did not focus on the question of whether a particular claim was perceived by consumers upon exposure (Smith, Tr. 5785, 7442–48, 7558). Indeed, Dr. Smith conceded that, if the issue was whether a particular advertisement made an alleged claim, he would have relied on his own judgment and on the ASI tests, in that order (Smith, Tr. 7518, 7562). This was what Dr. Ross, complaint counsel's expert, did and differs radically from what Dr. Smith did on his direct examination. (*E.g.*, Smith, Tr. 5785, 7517).

In any event, in determining the meaning of advertisements, in addition to relying on my own judgment as to what an advertisement as a whole can reasonably be interpreted to mean to a consumer, I have carefully considered all relevant record evidence on this issue. Now I shall turn to an examination of the challenged advertising claims. **[166]**

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[17] *E.g., Chrysler Corp.*, 87 F.T.C. 719, 751–52 (1976), *modified on other grounds*, 561 F.2d 357 (1977); *Ford Motor Co., supra*, 87 F.T.C. at 794–95.

[18] *E.g., Chrysler Corp., supra*, 87 F.T.C. at 751–52; Ford *Motor Co., supra*, 87 F.T.C. at 794–95.

[19] *American Home Products Corp.* v. *Johnson & Johnson*, Nos. 77–7503, 7527, Slip Opinion at 2887 n. 15 (2d Cir. May 1, 1978).

The Challenged Advertising Claims For Anacin

With respect to advertising claims for Anacin, all of the challenged claims can be viewed as representing a central claim, the claim of superior efficacy (Comp. ¶ 12(a)), with the exception of two groups. The two exceptions are those related to the so-called "tension relief" claim (Comp. ¶ 15) and the "22 seconds" claim (Comp. ¶ 8(A)(4)). Most of the other claims are related in some way to the central claim of superior efficacy and would be understood by consumers as variations of that central theme.[20] The so-called "establishment" claim (Comp. ¶ 10(A)) is implied as a matter of law from the superior efficacy claim.[21]

As Dr. Smith, respondents' expert, stressed, efficacy is the raison d'etre for OTC analgesic products. Such claims of specific product attributes as speed, strength or quantity of pain reliever will be associated with, and perceived as suggesting, efficacy by consumers (Ross, Tr. 1902–03; Smith, Tr. 5772–74, 5779, 7558–59). Thus, it is reasonable to view claims for such underlying product attributes in terms of superior efficacy.

1. *Representations That Anacin Has More Pain Reliever (Comp. ¶¶ 8(A)(1) and (3))*

It is my determination that a number of American Home's advertisements contained the claim that:

(1) Anacin has more pain relieving ingredients than any other OTC analgesic product (Comp. ¶ 8(A)(1)); and
(2) Anacin has more than twice as much of its pain relieving ingredient as any other OTC analgesic product (Comp. ¶ 8(A)(3)).

The claim that Anacin has more pain reliever is expressly made in many Anacin advertisements. For example, it is expressly claimed that Anacin provides "extra pain reliever" **[167]**(CX 50A through CX 53A) or that "Anacin tablets go further and add an extra slice 'by providing' all this extra pain reliever" (CX 30A). Some Anacin advertisements attempt to limit the comparison to more of a specific pain relieving ingredient. (*E.g.,* CX 13A, CX 14A, CX 23A, CX 164). For example, several advertisements state that:

> Of all the drugs to choose from, doctors most often recommend one pain relieving ingredient. And Anacin has more of it than any other leading headache tablet. (CX 13A, CX 14A).

[20] More pain reliever claim (Comp. ¶¶ 8(A)(1), (3)); better or different pain reliever claim (Comp. ¶ 8(A)(2)); doctors' preference claim (Comp. ¶ 20); and as effective as the leading prescription drug claim (Comp. ¶ 17).

[21] See p. 175, *infra.*

However, the impression that consumers will get is simply that Anacin has more pain reliever and, therefore, will provide significantly more pain relief than any other OTC analgesic product. Consumers will not make the subtle and refined distinction between "more pain reliever" and "more of a pain reliever" for the simple reason that the distinction is not meaningful to them. Indeed, why talk about more pain reliever or more of a pain reliever unless it is to mean significantly greater pain relief? (Ross, Tr. 1851–53, 1855, 1857–58, 1862–64, 1902–03; Smith, Tr. 5772–74, 5779, 7502–03, 7558–59).

Furthermore, the "more pain relief" message is often driven home by a simple, dramatic visual presentation. For example, some of the Anacin advertisements visually equate two Anacin tablets with four of the other extra-strength tablets (*e.g.*, CX 9A, CX 21A, CX 22A), or graphically illustrate Anacin's extra amount of pain reliever (*e.g.*, CX 15A, CX 30A, CX 33A, CX 41A, CX 60A).

It is true that the advertisements in question expressly compare Anacin to the "other extra-strength tablets" (*e.g.*, CX 9A, CX 21A, CX 23A, CX 89, CX115), to the "other leading" tablets (*e.g.*, CX 13A, CX 20A, CX 25A, CX 153), or to a group of other products (plain aspirin, buffered aspirin and the other extra strength tablets) (*e.g.*, CX 1, CX 30, CX 50, CX 105). However, they convey to consumers the message that Anacin provides more pain relief than any other product. For, if Anacin contains more pain reliever than the "leading products" and "extra strength" product, as well as plain aspirin and buffered aspirin, then Anacin has more pain reliever than anything else on the market, and "more pain reliever" means "more pain relief." **[168]**

2. *Representation That Anacin's Pain Relieving Ingredient Is Unusual, Special And Stronger Than Aspirin (Comp. ¶ 8(A)(2))*

It is my determination that a number of Anacin advertisements contained the claim that Anacin is different from ordinary aspirin and that it is stronger than aspirin.

For example, CX 173 states that:

> Anacin isn't just like an ordinary aspirin tablet. It has more of the drug doctors themselves most often choose to relieve pain.

Clearly the message is that Anacin is not like aspirin and that the "drug" in Anacin is something different from, and superior to, aspirin. Another advertisement, CX 41, states:

Anacin starts with as much pain reliever as the leading aspirin tablet. Then adds a core of this specific fast acting ingredient against pain.[22]

Similarly, the message is that Anacin starts with aspirin and adds some fast acting pain reliever to it. This impression is further reinforced by the fact that these advertisements do not say anywhere that Anacin's pain relieving ingredient is aspirin (Ans. of American Home, ¶ 22). In fact, American Home deliberately avoided such a disclosure for fear that "aspirin" will be confused with "Bayer Aspirin" by consumers (DeMott, Tr. 4659).

Furthermore, some of the advertisements emphasized Anacin's special or unique "formula." (See, *e.g.*, CX 26A, CX 89, CX 115). A special formula of Anacin means a special pain relieving formula and more pain relief to consumers. Otherwise, why talk about it in advertisements of an analgesic product?

3. *Representation That A Recommended Dose Of Anacin Is More Effective Than A Recommended Dose Of Any Other OTC Analgesic Product (Comp. ¶ 12(A))*

It is my determination that a number of Anacin advertisements contained the message that a recommended dose of Anacin is more effective than a recommended dose of any other OTC **[169]**analgesic product. This is the "more is better" message, the central theme running through many Anacin advertisements.

From my discussion in the preceding subsections 1 and 2, it follows that the advertisements which claim that Anacin has more pain reliever than any other product or that Anacin's pain reliever is special and stronger than aspirin also impliedly claim that a recommended dose of Anacin (2 tablets) is more effective for the relief of pain than a recommended dose of aspirin, buffered aspirin, the other leading headache tablets, the other extra strength tablets and anything else on the market.

Furthermore, some Anacin advertisements explicitly claimed greater efficacy for Anacin. For example, some claimed that Anacin will "work better" (*e.g.*, CX 153; CX 156), provide "extraordinary relief" (CX 172), or provide "extra pain relief power" (CX 115). Finally, the Anacin advertisements which claimed that Anacin is "as effective as" or provides "the same complete relief as" the leading prescription product (*e.g.*, CX 126 through CX 128, CX 132) clearly mean that Anacin is superior to all other non-prescription products.

[22] Also see CX 42A through CX 45A, CX 59, CX 63.

4. *Representation That Within 22 Seconds After Taking Anacin One May Expect Relief From Headache Pain (Comp. ¶ 8(A)(4))*

Although this alleged claim presents a close question, I have determined that this claim was made in a number of Anacin advertisements.

For example, CX 1A (a television commercial) states in part:

> While you won't feel it for minutes, right now relief is racing to your headache. So quickly that in the short time it takes you to kiss a baby, in just 22 seconds after Anacin is in your blood stream, it's already starting to work on your headache . . . .

In the video portion, a woman with a headache is taking Anacin while the clock begins to tick away. She then goes into her child's room and kisses her baby. Her facial expression changes to smiles. At the same time, the title "twenty-two seconds" appears on the screen. Although the audio message starts with a qualifier that "you won't feel it for minutes," it goes on to talk about how "right now relief is racing to your headache," and "in just 22 seconds after Anacin is in **[170]**your blood stream, it's already starting to work on your headache." In these circumstances, it is of course arguable that the message is qualified, and that consumers know better than to believe that any tablet can relieve a headache in just 22 seconds. However, in my view, a viewer of this television commercial will relate "22 seconds" to "headache relief" or at least understand the commercial to mean that in 22 seconds something will happen that will start the relief action. Thus, in terms of the imagery or environment depicted by the audiovisual presentation as a whole, the commercial can be reasonably interpreted to mean that within 22 seconds one may expect some relief from a headache.

Likewise, CX 151, a print advertisement,[23] states in prominent part:

> In 22 seconds after entering the bloodstream, Anacin is speeding relief to your pain—bringing you remarkable "all-over" relief . . . .

Unlike the television commercial reviewed above (CX 1A), this print commercial does not contain any qualifier. In my view, consumers will understand that "22 seconds" is meant to refer to the time period between the taking of Anacin and the beginning of relief. Otherwise, why would a commercial talk about 22 seconds?

5. *Representation That Anacin Relieves Nervousness, Tension*

[23] Also see, *e.g.*, CX 142 through CX 144, CX 153.

And Depression And Will Enable A Person To Cope With The Ordinary Stresses Of Every Day Life (Comp. ¶ 15)

It is my determination that a number of Anacin advertisements made the so-called tension relief claim alleged in Paragraph 15 of the Complaint.

A number of Anacin advertisements not only contained a generous sprinkling of such words as "tension," "nerves," "stress," "fatigue" and "depression"[24] but also depicted a variety of situational tensions.[25] Indeed, in some [171]television commercials the dominant image is situational tension and pain relief is clearly a secondary message.[26]

In some of the advertisements, stress and tension are emphasized in terms of the advertising time and space. For example, in CX 5, a television commercial, the major portion of both the audio and visual presentation focuses on tension and stress rather than on pain. Similarly, in CX 155, a print commercial, the prominent headline in bold-faced type says that Anacin "Calms Anxiety and Tension." Although the smaller type below this headline goes on to say, "as it relieves headache pain," consumers are likely to perceive the claim in the headline and understand the message to be relief from tension and anxiety apart from headache pain.

A number of the so-called tension relief advertisements represent in my view a skillful use of the imagery or symbolic technique of communication made possible by the television medium. In these commercials, through effective use of aural-visual techniques (sound effects, music and camera), the verbal content of a commercial (tension associated with pain) is submerged and reduced to a faint background noise while the dominant aural-visual imagery (situational tension) comes through dramatically.[27] (*E.g.*, CX 5, 7A, 26A and 89). The overall impact of these advertisements upon a viewer is clearly that Anacin is not only a pain reliever but is also good for tension, nerves, stress, fatigue and depression and helps one to cope with the ordinary stresses of everyday life, as alleged in the Complaint.

Finally, the record shows that a substantial segment of consumers believe that OTC analgesic products are good for tension relief (F. 571). It is therefore reasonable to conclude that Anacin's tension relief advertisements contributed in a substantial measure to the

[24] *E.g.*, CX 3, 5, 7A, 8A, 15A, 17A, 21A, 25A, 26A, 27A, 39A, 40A, 44A, 46A, 89, 115 and 155.

[25] *E.g.*, CX 3, 5, 7A, 8A, 17A, 26A, 40A, 46A, 170 and 171.

[26] *E.g.*, CX 3, 5, 7A, 8A, 40A and 46A.

[27] See pp. 162–64, *supra*. The record also shows that American Home recognized the effectiveness of this technique. *E.g.*, CX 327, CX 329, CX 402D, CX 404E, CX 420N.

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creation of this consumer image. See pp. 220–22, *infra.* In my view, it is also obvious that the tension relief advertisements found a receptive audience who readily recognized and understood the tension relief theme. This is confirmed by the [172]ASI verbatims which indicate that as many as 17 to 25% of the viewers perceived the claim that Anacin is good for tension. See CX 420, CX 404; Smith, Tr. 7633–35.

6. *Representation That Certain Tests Prove That Anacin Is As Effective As The Leading Prescription Analgesic Drug And More Effective Than Any Other OTC Product (Comp. ¶ 17)*

It is determined that the alleged representation was made in a number of Anacin advertisements.

American Home has admitted that it made the representation that the scientific tests referred to in certain advertisements prove that Anacin is as effective as the leading prescription analgesic product (Ans. of American Home, ¶ 17. Also see CX 126 through CX 137, CX 140–41, 173 and 179). From this admission, it follows that American Home also impliedly claimed that Anacin is more effective than any other non-prescription analgesic product since consumers will readily perceive the "leading prescription product" to be more effective than non-prescription products.

7. *Representations Concerning Doctors' Survey (Comp. ¶ 20)*

The complaint charges that American Home made the representations that:

(1) A doctors' survey showed that twice as many specialists in internal medicine prefer Anacin for the treatment of headache pain to any other non-prescription analgesic product;

(2) More doctors recommend Anacin than any other non-prescription analgesic product for the treatment of headache pain; and

(3) Such recommendation constitutes convincing proof that Anacin will relieve headache pain more effectively than any other non-prescription analgesic product.

It is determined that a number of Anacin advertisements contain the alleged claims. CX 81 through CX 84 and CX 176 expressly claim that a survey of specialists in internal [173]medicine showed that "twice as many doctors said they would recommend their patients use the Anacin formula to relieve pain over that of the other leading extra-strength tablet" and further that this is "convincing proof about Anacin."

In my view, these advertisements also contain implied claims that twice as many doctors prefer Anacin over any other OTC analgesic product[28] and that such recommendation constitutes convincing proof that Anacin relieves pain more effectively than any other OTC analgesic product.[29] With respect to CX 146 through CX 148, the comparison is expressly limited to "the two leading extra-strength pain relief formulas." However, consumers will perceive that since Anacin is chosen 2 to 1 over the other extra-strength product by doctors, Anacin is more effective than any other OTC analgesic product.

The Challenged Advertising Claims For Arthritis Pain Formula

1. *Representation That APF's Analgesic Ingredient Is Unusual, Special And Stronger Than Aspirin (Comp. ¶ 8(B)(1))*

It is my determination that a number of APF advertisements contained the alleged claim.

For example, several advertisements explicitly contrasted APF's pain reliever with aspirin. CX 201A, a television commercial, stated that:

I'm on something different . . . Arthritis Pain Formula . . . 50% more pain reliever than a regular aspirin. So strong that you don't need it as often.[30]

The message is clearly that APF has some special pain reliever that is different from, and stronger than, aspirin. Indeed, the name of the product itself, "Arthritis Pain Formula," [174]suggests that meaning. Other television commercials, such as CX 210A, CX 217A and CX 218A, clearly characterize APF's pain reliever as something special and strong. Moreover, none of the challenged APF advertisements tells the consumer that APF's analgesic ingredient is ordinary aspirin. In these circumstances, an interpretation of these advertisements as conveying the message that APF's analgesic ingredient is something other than aspirin and stronger than aspirin is eminently reasonable.

2. *Representation That APF Will Eliminate All Pain, Stiffness And Discomfort Experienced By Arthritics (Comp. ¶ 8(B)(2)*

I have determined that the challenged APF advertisements cannot be reasonably interpreted to convey the alleged claim to consumers. Although it is arguable that several television commercials (*e.g.*, CX

[28] See CX 424; Ross, Tr. 1930–32.

[29] See Smith, Tr. 5903, 7598.

[30] Also see CX 206A, CX 210A, CX 217A, CX 218A.

201A, 202A and 203A), especially in their video portions, are capable of conveying the alleged claim to the consumer, I am not persuaded that it is a reasonable interpretation. In my view, these advertisements are clearly targeted to arthritis sufferers, a group that knows that no OTC drug can be expected to give complete relief from arthritic pain. Any other conclusion would be contrary to common sense. Furthermore, such expressions as "get going without all that pain or stiffness" cannot reasonably be interpreted to mean complete and total relief. When I viewed the challenged television commercials, the thought of a promise of complete relief from all arthritic pain never occurred to me. Even when I went back to them to look for the alleged claim, I was unable to see them. The message of these commercials is that APF is something special for arthritis sufferers, that it is stronger than aspirin, and that it will relieve some of the pain and stiffness of arthritis and help you get going.

3. *Representation That APF Will Cause Gastric Discomfort Less Often Than Any Other OTC Product (Comp. ¶ 12(B))*

It is my determination that a number of APF advertisements conveyed the alleged claim.

The express claim that APF is gentle to the stomach because of its "double-buffering" or because it is "microfined" clearly convey the message that APF has a larger amount of buffering action than other buffered products and is finer than others and that, therefore, it is the **[175]**gentlest of all OTC analgesic or antirheumatic products on the market. See, *e.g.*, CX 203A, CX 204A, CX 205A, CX 206A, CX 210A.

The Challenged Advertising Claims That Certain Claims Have A Reasonable Basis Or Are Established

1. *Representation That Tension Relief Claim Has A Reasonable Basis (Comp. ¶ 16)*

Under *Pfizer*,[31] the affirmative product claim that Anacin relieves tension implies as a matter of law that American Home has a reasonable basis for that claim and that American Home relied on it for the marketing of Anacin.

2. *Representation That Certain Comparative Efficacy Or Safety Claims Have Been Established (Comp. ¶¶ 7, 10(A) and (B), 11 and 17)*

[31] *Pfizer, Inc.*, 81 F.T.C. 23 (1972).

Based upon the reasons discussed in pp. 210–16, *infra*, I have determined that the comparative efficacy claims for Anacin and APF and the comparative safety claim for APF carry within them, as a matter of law and marketplace fairness, an implied representation that the claimed superior efficacy or safety is scientifically established and that the proposition is accepted as proven or as a medical-scientific fact by the vast majority of scientists who are by training and experience competent to evaluate the validity of such propositions.

Furthermore, a number of Anacin advertisements expressly represented that the claim is "medically proved," or that there is "convincing proof" that the claim is a scientifically established fact. *E.g.*, CX 50A through CX 53A, CX 105 through CX 107, CX 149. Some of the advertisements also conveyed this message through the presentation of technical graphs measuring blood levels (CX 50A through CX 56A), by reference to actual scientific or clinical tests (*e.g.*, CX 81, CX 105 through CX 107, CX 126 through CX 137, CX 140 through CX 141), or by the use of chemical formulas (*e.g.*, CX 15A). **[176]**

Pain And Aspirin Products—Some Preliminary Observations

Pain is said to be the most common symptom for which man seeks relief by medication. It is generally agreed that mild to moderate pain that is self-limited ("minor pain") may be treated symptomatically by self-medication.[32] Pain is a subjective condition of diverse and often obscure etiology and defies a precise definition. Beecher, a recognized authority in the study of pain and analgesia, has observed that:

> Pain is a subjective matter clearly "known to us by experience and described by illustration." [However,] lexicographers, philosophers and scientists have none of them succeeded in defining pain. Having said that it is the opposite of pleasure, or that it is different from other sensations (touch, pressure, heat, cold) or how it is mediated (through separate nerve structures), or what the kinds of it are (bright, dull, aching, pricking, cutting, burning), or what kinds of things will produce it (trauma to nerve endings or to nerves, electric shocks, intense stimulation of the sensations of touch, pressure, heat, cold), or what it comes from (injury, bodily derangements, or disease), or that certain types of mild stimulation can probably be stepped up to a painful level through conditioning or what some reaction patterns to it are (escape or avoidance), none of these individual statements, nor indeed their sum total, provides a definition of pain.[33]

"Minor pain" was defined by the FDA OTC Internal Analgesics

[32] CX 367F.
[33] CX 367F–G.

Panel as "pain that is self-limited and which requires no special treatment or prior diagnosis by a physician." Minor pain is usually described as pain "of mild to moderate intensity as opposed to sharp, severe and/or protracted pain."[34] [177]

It is not surprising that aspirin is by far the most widely used OTC drug in the United States. It is estimated that almost 19 billion dosage units are sold annually. This amounts to about 5 million daily dosage units for every man, woman and child. Since aspirin was introduced into the American market some 75 years ago, it has been discussed extensively in the medical-scientific literature.

Although such important aspects of aspirin's pharmacological profile as the specific mechanism of its action and the localization of the site of its chemical action in humans are yet to be definitively determined, a considerable amount of biopharmacological data has been published with respect to the relationship between the dosage of aspirin and its analgesic action and the mechanism of its metabolism in animals and humans. It is now generally agreed, primarily on the basis of historical data, that aspirin is safe and effective as a mild analgesic, antipyretic and antirheumatic agent for humans.

It is generally believed that aspirin alleviates pain by both a peripheral effect (*i.e.*, the blockade of pain impulse generation) and a central nervous system effect.[35]

Aspirin is also an effective antipyretic or fever reducer, and may be safely used for self-medication when fever is due to the common cold or flu. Aspirin lowers the temperature in patients with fever but has no effect on the body temperature when it is normal. Heat loss is increased by increased peripheral blood flow and sweating, which is caused by a central action of aspirin on the hypothalamus.[36]

Inflammation and many rheumatic diseases often are accompanied by pain and sometimes fever. Since, in many rheumatic conditions, the object of therapy is to stop the disease process which usually requires drug dosages higher than those recommended for OTC use, OTC drugs for the treatment of inflammatory conditions and rheumatic disease should be used only under the advice and supervision of a physician. Aspirin acts as an agent which reduces joint or muscle tenderness or swelling. The precise mechanism or mechanisms of [178]action by which aspirin exerts anti-inflammatory effects is not known.[37]

In recent years, the medical-scientific knowledge and understand-

[34] CX 367G.
[35] CX 367G, Z011.
[36] Lasagna, Tr. 4096–97; CX 367G-H.
[37] CX 367H.

ing of aspirin's other (side) effects have been substantially expanded, promising both new benefits (such as the use of aspirin in anticoagulant therapy) and risks (such as the problem of aspirin intolerance). Based upon an exhaustive review of available data in medical-scientific literature, the FDA OTC Internal Analgesics Panel concluded that the most appropriate label indications for pain for OTC analgesic agents including aspirin should state: "For the temporary relief of occasional minor aches, pains and headache." It is generally agreed that aspirin is effective in mild to moderate pain although of limited value in severe pain. Recurrent or chronic pain even of minor intensity, such as frequent headaches or joint pain which flares up periodically, may indicate pathologic condition and should not be treated with OTC analgesics except under the advice and supervision of a physician.[38]

Since one of the most prevalent uses of aspirin and aspirin-containing products is in the treatment of headache pain, it is important to have a general understanding of this all too common affliction.

Headache, or cephalalgia, is a unique symptom and an ambiguous term for pain having many different etiologies. The most common type of headache is occasional headache, which is transient (usually lasting less than one day) and may be secondary to many factors including fatigue, tension, eyestrain, fever or alcohol ingestion. The chronic or recurrent headache may be caused by more serious underlying diseases such as vascular disturbances, brain tumor or abscess, intracranial lesions or lesions of the eye, nose, ear or throat.[39]

Headaches can be differentiated into three major categories: vascular, psychogenic and traction-inflammatory headaches. Vascular headache is provoked by the tendency for vasodilation that accompanies physiological changes [**179**]in cranial blood vessels. Common types of vascular headaches are hypertensive, migraine and toxic. OTC analgesics are inappropriate for hypertensive or migraine headaches. Psychogenic headache, one of the most common types of headache, accounts for up to 90% of chronic headaches. It is accompanied by persistent contraction of the muscles of the head, neck, and face, and may even be described as a sense of pressure rather than a true pain. Apprehension, anxiety, post-traumatic experiences and depression, as well as the individual's life stresses and habits, can precipitate the symptoms. Psychogenic headaches

[38] Generally see CX 367F, G, Z011–Z013; Stevenson, JTr. 1481–88; Grossman, Tr. 841–43; Farr, JTr. 2566–70; Azarnoff, Tr. 618–20.

[39] CX 367H.

are often described by synonymous terms such as muscle contraction and tension headache. Self-medication utilizing OTC analgesic drugs is generally contraindicated for chronic psychogenic headache. Traction and inflammatory headache, evoked by organic disease, is associated with inflammatory disease of the meninges, and intracranial or extracranial arteries or phlebitis. Although the FDA OTC Internal Analgesics Panel concluded that the occasional headache is self-limited and requires no medication, it recognized OTC analgesics' usefulness for symptomatic treatment.[40]

One of the issues in this case, related to the claimed superior efficacy of Anacin and APF, is whether the aspirin dose-response relationship studies, using moderate to severe pain in terminal cancer patients and patients with post-partum pain or post-operative pain, are applicable to headache pain. There is a conflict in the testimony of experts on this issue. In my view, the record as a whole does not show that all pain is alike. The record does show that the precise shape of a dose-response curve for aspirin is not known, and that the applicability of aspirin dose-response studies using pain other than headache pain (such as post-operative, post-partum and cancer pain), and encompassing the pain intensity spectrum of mild to moderate to severe pain (or only severe pain), to headache pain remains to be demonstrated.

The Therapeutic Superiority Of Anacin Over Aspirin Has Not Been Scientifically Established

I have determined that complaint counsel have established, by a preponderance of probative and reliable evidence, the negative proposition that the therapeutic superiority in terms of efficacy or safety of Anacin or APF over aspirin has not [180]been established. The record as a whole clearly shows that in order for therapeutic superiority to be established there must be two or more well-controlled clinical demonstrations which show statistically and clinically significant superior performance and which will cause the proposition to be accepted as a medical-scientific fact, or as "established," by the vast majority of experts who are by their training and experience qualified to evaluate the validity of such propositions. In my view, the record contains substantial medical-scientific evidence tending to show that two tablets of Anacin may reasonably be expected to provide technically greater analgesia than two tablets of aspirin for some individuals. However, that evidence is insufficient

[40] Rickels, Tr. 1198–99; CX 367H-I.

to overcome complaint counsel's *prima facie* showing that the therapeutic superiority of Anacin over aspirin has not been established as a scientific proposition. More importantly, the record also provides a basis for concluding that the extra amount of analgesia posited for Anacin by some dose-response studies does not have clinical significance as a practical matter.[41]

First, respondents have failed to produce or point to two or more well-controlled clinical studies which demonstrate statistically significant difference in analgesia between the two test drugs. Such eminent experts in the field of comparative analgesics as Drs. Moertel, DeKornfeld, Forrest, and Azarnoff testified that nothing short of that can establish respondents' thesis as a medical-scientific proposition (F. 197 and 200). Respondents' experts, Drs. Lasagna, Kantor, Wallenstein, McMahon and Okun expressed an opinion that Anacin will provide greater analgesia than regular aspirin, but they agreed that the only way to *prove* a statistically significant difference in the analgesic effects of Anacin versus aspirin would be to conduct a well-controlled head-to-head clinical trial. (Lasagna, Tr. 4249, 4271–73; Kantor, Tr. 3647; Wallenstein, Tr. 3513; McMahon, Tr. 3981; Okun, Tr. 4475–76, 4493–94, 4522–23).

The requirements with respect to the parameters of a well-controlled clinical demonstration (F. 201–17) are not the whim of a handful of partisan pharmacologists. On the [181]contrary, they represent a crystallization of slow and deliberate evolution in the development of a scientific methodology in clinical pharmacology that began in the early 1950's (F. 199). By the early 1960's, clinical pharmacologists, including respondents' medical-scientific experts, lived by them. Any learned journal of any consequence would not accept for publication a clinical trial of therapeutic agents which purports to measure their efficacy unless the study satisfies all of the essential elements of those requirements (F. 197, 200–17). Indeed, since the advent of the 1962 Amendment to the Food, Drug and Cosmetic Act, the FDA has incorporated these requirements into its regulations governing new drug applications for both prescription and non-prescription drugs. In my view, *the importance of these requirements increases when the question becomes one of comparative efficacy rather than simple efficacy or lack of it.*

Respondents' experts do not dispute the essential validity of the scientific rationale for these requirements, including the principle of replication. (*E.g.*, Lasagna, Tr. 4119–30, 4142–45, 4897–98). Rather,

[41] Although the focus of our analysis will be on the question whether superior efficacy of Anacin over aspirin is scientifically established, what really matters to consumers is whether the difference, if any, is clinically and therapeutically significant. Otherwise, why pay a higher price for Anacin?

the recent disaffection of some clinical pharmacologists appears to be based on socio-medical policy grounds. For example, Dr. Lasagna, a long-time advocate of the application of the scientific method to pharmacological research (Okun, Tr. 4412), has become convinced in recent years that the FDA's "bureaucratic dogma" requiring pre-marketing tests of all new drugs in animals and humans, including two well-controlled clinical demonstrations in humans, is excessively rigorous, resulting in a diminishing number of significant new drug introductions in this country and exacting excessive social costs.[42] (*E.g.*, Lasagna, Tr. 4185-86). [182]

American Home argues that in order to establish the existence of a substantial question, complaint counsel must come forward with a substantial amount of clinical data which tends to refute the alleged claim (RB at 6). Although the existence of a substantial amount of contrary scientific data will clearly preclude a claim from being scientifically established, such a requirement would, in my view, go beyond what is necessary to show that a given medical-scientific proposition is not established and may go a long way towards refuting the existence of a reasonable basis for the proposition. This is clearly contrary to the very rationale of the establishment-substantial question theory as a basis of Section 5 liability and should be rejected.[43] [183]

The evidence that American Home relies on in support of superior efficacy claim consists primarily of the allegedly "positive" or "ascending" dose-response curve for aspirin. Upon a closer analysis, however, this argument consists of two related, yet distinct, proposi-

[42] It may well be that the FDA's new drug approval procedures could stand improvement in some respects in light of the regulatory experience since the 1960's. Also, a strong argument can be made against restricting the freedom of a practicing physician to prescribe the treatment best suited in his judgment for his patient's condition at a particular stage in the disease process. In the final analysis, however, none of these arguments addresses or refutes the scientific rational of the well-established research methodology in clinical pharmacology. The most that can be said in these circumstances may be that there are a number of respected clinical pharamacologists who will be satisfied by a single, well-controlled clinical demonstration, conducted by an experienced investigator of established repute, and showing statistically significant differences of a substantial magnitude. Be that as it may, it is entirely another matter to argue that the rigors of established research methodology in clinical pharmacology should be discarded in advertising regulation, especially when the question is, as here, the scientific validity of a claim of therapeutic superiority of a particular OTC formulation (800 mg. aspirin and 65 mg. caffeine) over another product (650 mg. aspirin) for a specific condition (relief of minor pain or headache pain). In any event, respondents in this case have failed to produce a single definitive study, of the kind that will satisfy the "revisionists," in support of its claim.

[43] See pp. 210–16, *infra*. However, the record also contains some "contrary" medical-scientific evidence. For example, one of Dr. Kantor's aspirin dose-response studies showed a reverse curve between 600 mg. and 1200 mg. aspirin (F. 254). Dr. Kantor carefully reviewed the test procedures and data and could not explain away the reverse response (Kantor, Tr. 3622–23). Dr. Kantor also admitted that he did not know at what point between 600 mg. and 1200 mg. aspirin reached a plateau (Kantor, Tr. 3596). One of Dr. Parkhouse's aspirin dose-response studies also showed a reverse curve (Lasagna, Tr. 4922). Furthermore, the record contains a substantial amount of "negative" data in that many aspirin dose-response studies failed to show any statistically significant differences between the graded dosages tested (F. 243–55). Dr. Lasagna, respondents' expert witness, agreed that if enough studies fail to show any statistically significant differences between two drugs, then one may conclude that the two drugs were equally effective and that a claim of superiority could not be made (Lasagna, Tr. 4249). In my view, this is such a case.

tions. First, it is argued that a statistically significant, positive dose-response curve for aspirin has been shown to exist. Second, from the first proposition, so it is argued, it may be inferred that 800 mg. aspirin provides greater analgesia than 650 mg. aspirin. In my view, each of the two propositions is open to serious doubt. First, *the precise shape of a dose-response curve for aspirin is far from being established.* Second, and more importantly, even accepting at face value the studies which purport to show a statistically significant positive dose-response curve for aspirin, *the particular proposition that 800 mg. aspirin provides more and statistically significant analgesia than 650 mg. aspirin is nothing but an inference,*[44] albeit one based on sound pharmacological reasoning, *and remains to be verified by direct clinical tests.*[45] **[184]**

The concept of dose-response relationship is a pharmacological formulation of the common sense notion that there is a relationship between the amount of a drug and the intensity of the drug's effect. The dose-response studies are attempts to quantitate this relationship scientifically and are usually expressed graphically (by way of the dose-response curve). The dose-response curve is generally accepted as a useful statistical tool in estimating the efficacy of a drug in terms of its anticipated potency and also serves as a basis when gauging the risk-benefit ratio of the drug in terms of its toxicity and side effects (dose-finding function). As such, it is an expression of the drug's intensity of action for specific dosages and must be interpreted in terms of such variables as the weight of test subjects, the ratio of the rate of absorption and distribution to the rate of detoxification or excretion, the physical properties of the drug and other specific characteristics of the test subjects. These variables are capable of fairly precise measurements. On the other hand, because of the peculiarities of individuals, judgment factors are

[44] *E.g.*, Kantor, Tr. 3656; Lasagna, Tr. 4271–73.

[45] American Home asserts that "the inferential process is a fundamental principle of all fields of science." (RRB, at 17 n. 14). It is true that the inferential process of induction and deduction is at the heart of the scientific method. By observation of particular events and from established general principles, new hypothetical propositions are formulated; the hypothesis is empirically tested; as the test results satisfy the conditions of the hypothesis, laws are arrived at by induction; from these laws, future results may be determined by deduction. However, the validity of a deductive inference depends on the truth or universality of the original principle, while the validity of an inductive inference depends on the uniformity of the subject matter and attains at most a high degree of probability. To apply this process to aspirin dose-response studies, a comparison of the results obtained at a sufficient number of graded dosage points may provide a basis for an inductive inference that there is a high probability that more aspirin will provide greater analgesia than less aspirin. The validity of this inference, however, depends on the representativeness of the test population. Even in cases where the test subjects were randomized, they were not representative samples of any group. Even assuming the validity of the inductive inference in this example, the validity of the deductive inference that 800 mg. aspirin will provide greater analgesia than 650 mg. aspirin depends on the accuracy of two underlying assumptions: (1) that the line connecting the mean data points actually tested corresponds to the true aspirin dose-response curve; and (2) that all pain is the same. As discussed hereinbelow, the accuracy of these two assumptions is open to serious doubt. *Cf.*, Lasagna, Tr. 4271–73.

inevitably involved. The subjective pain response model studies are attempts to apply this concept to natural or spontaneous pain states.[46]

There appears to be substantial agreement among clinical pharmacologists that, for the relief of mild to moderate pain for which aspirin is indicated, aspirin's minimum effective dosage is in the neighborhood of 325 mg., the usual single dosage about 650 mg., the usual effective dosage range about 325 to 650 mg., the maximum single dosage about 1000 mg., and the maximum daily dosage about 4000 mg. (*e.g.*, CX 367M-N). Until the late 1960's, it was generally agreed that 10 grain (about 650 mg.) aspirin was the maximum effective dosage for headache pain (Friedman and Merrit, p. 40; Wolf, *Headaches: Their Nature and Treatment* (1955), p. 68; Murray, "Evaluation **[185]**of Acetaminophen-Salcyilamide Combinations In Treatment of Headache," *The Journal of Clinical Pharmacology*, 7:150–155, 1967 (discussed in CX 367Z012).[47]

In the early and middle 1970's, a number of studies of graded aspirin dosages using patients with cancer, post-partum or post-operative pain suggested a dose related increase in pain relief between 600 and 1200 mg. aspirin. However, *none of the studies showed statistically significant differences between 650 mg. and 800 mg. aspirin. Furthermore, no headache pain study showed a statistically significant difference beyond 600 mg. aspirin.* For example, in the second Bloomfield study of post-partum patients, the response curve became flat at about the 600 mg. level (F. 246). The 1965 Kantor study showed that the specific dose-response curves were different for uterine cramp pain and episiotomy pain, and for uterine cramp pain a plateau was observed somewhere between 600 and 1200 mg. aspirin (F. 248–55). In Parkhouse's five studies of post-operative patients at three hospitals in England with 600 mg. and 1200 mg. aspirin, two studies showed about the same level of analgesia for the two doses, and three showed somewhat greater analgesia for 1200 mg. aspirin. Although three studies showed generally positive dose-response relationships, no statistically significant difference was observed between the two doses (F. 247). Although Kantor's 1977 study of post-partum patients showed a

[46] See,*e.g.*, Lasagna, Tr. 4047, 4102, 4144–45, 4156–57, 4271–73, 4953–55; Kantor, Tr. 3571–72, 3582–83; Okun, Tr. 4487–4502; Forrest, Tr. 556–57; Azarnoff, Tr. 606–07, 618–20, 629–30, 640–42, 652–54.

[47] Murray concluded that about 53% of headache patients do not need medication, and that of 47% who do need medication, about one-half will experience relief from a standard dosage (650 mg.) of aspirin. Dr. Lasagna, however, is of the view that, although some headache patients may experience complete relief from 10 gr. aspirin, many would experience greater relief with larger dosages (Lasagna, Tr. 4153–56, 4158–59).

In this connection, American Home's argument that the FDA OTC Internal Analgesics Panel recognized the superior efficacy of dosages greater than 650 mg. when it set the maximum single dosage at 1000 mg. is without merit. The 1000 mg. dosage clearly refers to safety rather than to efficacy when viewed in context.

positive dose-response relationship with 300, 600 and 1200 mg. aspirin, one of his earlier studies showed a reverse curve between 600 and 1200 mg. aspirin (F. 252 and 254). **[186]**

American Home places great reliance upon the McMahon study it commissioned for use in this litigation (RX 31). The purpose of the McMahon study was to clinically demonstrate, in a study of uterine cramp pain and episiotomy pain, the superior analgesic efficacy of two tablets of Anacin over two tablets of plain aspirin. The first McMahon study showed that Anacin does not provide statistically significant superior analgesia for a mixed uterine cramp-episiotomy pain population with moderate to severe pain. The second McMahon study showed Anacin provides a statistically significant superior analgesia *for the subgroup of episiotomy patients with severe pain* and *only for hours two and three in two of the four scales used,* and not including the global scale (Lasagna, Tr. 4879–80). However, the second McMahon study is of very limited value because of its numerous and serious defects (See F. 293–311).

At the hearing, respondents' two most eminent experts, Drs. Kantor and Lasagna, suggested that the recent insights provided by pharmacokinetics that saturation of aspirin's metabolic pathway of excretion in humans occurs at well beyond the 1200 mg. aspirin level, in combination with the aspirin dose-response studies and the presence of caffeine in Anacin, provide sufficient scientific support for the proposition that two tablets of Anacin give significantly greater analgesia than two tablets of plain aspirin for all types of pain, including headache pain (Kantor, Tr. 3582–83; Lasagna, Tr. 4207–08). Several questions may be raised with respect to the Kantor-Lasagna thesis. *First,* the relevance of the pharmacokinetic insight to the relief of headache (mild to moderate) pain is not apparent. It may be that an effective analgesia of *headache pain* is attained well before the saturation point is reached. *Second,* the applicability of the dose-response study findings, as inconclusive as they are, to headache pain or to any mild-to-moderate pain is open to serious doubt. It may well be that an effective analgesia of headache (mild to moderate) pain is reached before or near the point where a plateau is reached and the curve becomes flat.[48] *Third,* the efficacy of caffeine in a combination like Anacin has not been proven (Lasagna, Tr. 4227, 4265). **[187]**

The 1969 Hill and Turner studies[49] are illuminating. In a double-

[48] Dr. Lasagna conceded that the effects of 650 mg. and 800 mg. aspirin for mild to moderate pain, including headache pain, may be virtually the same (Lasagna, Tr. 4866).

[49] Hill, R.C. and P. Turner, "Post-Operative Pain in the Assessment of Analgesics in Man," *Brit. J. of Pharmacology* 35:363–364, 1969; "Importance of Initial Pain in Post-Operative Assessment of Analgesic Drugs," *The Journal of Clinical Pharmacology,* 9:324–327, 1969, discussed in Panel report, CX 367Z013.

blinded study of post-operative pain comparing aspirin with meperidine (a narcotic agent), aspirin was preferred at milder pain levels while meperidine was preferred at the severe pain levels. In another double-blinded study with post-operative (gynecological) pain, they could not differentiate between the two drugs and placebo in the patient population as a whole, but could differentiate between them when the patients were classified according to the initial severity of their pain. In the FDA OTC Internal Analgesics Panel's words, the "latter study could have been insensitive if the pain intensity had not been considered and illustrates one of the inherent difficulties in analgesiometry." In my view, these studies strongly suggest that 650 mg. aspirin probably is as effective as 800 mg. aspirin for mild to moderate pain, but 800 mg. aspirin may be preferred for severe pain.

A more fundamental question may be raised about the scientific validity of applying to headache pain inferences drawn from extrapolations based on the subjective pain response model methodology using cancer, post-partum and post-operative patient populations.

First, American Home vigorously argues that pain is pain and that the aspirin dose-response studies using post-operative, post-partum and cancer pain resolve the question of comparative efficacy in its favor. However, *there is no scientific evidence that headache pain is the same as post-partum pain, or pain in terminal cancer patients.* Indeed, not only is there evidence to the contrary, but common experience also suggests a contrary conclusion.[50] Dr. Lasagna, respondents' expert, agreed that one should show the comparative efficacy of one analgesic drug over another in several different types of pain before generally assuming that the drug would be superior to another in other untested types of pain (Lasagna, Tr. 4968). Drs. Kantor, Lasagna and Okun, [188]all respondents' experts, agreed that uterine cramp pain responses differ from episiotomy pain.[51] Drs. Kantor and Lasagna agreed that pain accompanied by inflammation responds differently from pain unaccompanied by inflammation.[52] Dr. Lasagna also testified that migraine headache pain does not respond to aspirin because of its different etiology.[53] Dr. Kantor also criticized the dose-response studies using cancer pain (such as the studies by Moertel, Houde, Sunshine and Wallenstein).[54]

[50] Anyone who has undergone surgery or experienced toothaches will agree that post-operative pain or dental pain is not like headache pain. Common experience also shows that the threshold of pain might differ substantially among individuals, as might their interpretation of pain. Moreover, pain response has a strong emotional component.

[51] Kantor, Tr. 3559–60; Okun, Tr. 4537–39, 4547–48; Lasagna, Tr. 4883–84.

[52] Lasagna, Tr. 4069–70. Dr. Kantor's study with trauma pain produced a reverse response curve between 600 mg. and 1200 mg. aspirin (Kantor, Tr. 3616).

[53] Lasagna, Tr. 4069–70. See also CX 367H-I.

[54] Kantor, Tr. 3645–46.

Dr. Okun agreed that the relative efficacy of two drugs may differ depending upon the type of pain involved.[55]

Second, complaint counsel's experts testified almost without exception[56] that the appropriate pain model for the purpose of determining the comparative efficacy of two dosages of a drug or two drugs is one using patients suffering from the particular type of pain in question. Dr. DeKornfeld insisted that at least one of the two well-controlled clinical demonstrations must use the particular pain in question before the findings can be applied to that pain.[57]

Third, complaint counsel's expert witnesses, with impressive experience and reputation in the field of comparative study of analgesics, testified that owing to the [189]subjective nature of pain the aspirin dose-response studies require that the test data be conservatively interpreted. For example, Dr. DeKornfeld observed that, because the analgesic testing is generally more fuzzy and imprecise in the sense of reliable results, more rigorous methodological requirements are indicated for comparative efficacy studies of analgesic agents than for some other pharmacological agents.[58] Dr. Forrest testified that in dose-response studies, a 10% difference may mean something when a subjective element (such as pain) is not involved, but that in subjective pain response model studies, a 10% difference may not mean anything.[59]

Fourth, both complaint counsel's and respondents' experts generally agreed that, with specific reference to mild to moderate pain, or headache pain, the 150 mg. difference in the amount of aspirin between two tablets of Anacin and two tablets of regular aspirin may not be sufficient to produce a therapeutically significant difference in analgesia.[60]

It is true that American Home's experts expressed an opinion upon direct examination that pain is pain and suggested that the findings of the aspirin dose-response studies using post-partum, post-operative and cancer pain are equally applicable to all types of pain, including headache pain. However, the experts were addressing the applicability of these findings to totally undifferentiated pain without regard to its intensity. Dr. Lasagna conceded that, for the relief of minor pain (including headache pain), the relief obtained

[55] Okun, Tr. 4422.

[56] Dr. Moertel, who conducted a comparative analgesic study using cancer pain, is of the view that the perception of pain may be different between headache and cancer, because the underlying causes are different, even though the responses are comparable (Moertel, Tr. 937–40). However, Dr. Moertel indicated that superior efficacy of Anacin over aspirin can be established only by two or more well-controlled clinical demonstrations, one of which should use headache pain (Moertel, Tr. 959–60).

[57] DeKornfeld, Tr. 2778–80, 2785–86, 2802–03, 2832. See also Lasagna, Tr. 4968.

[58] DeKornfeld, Tr. 2831.

[59] Forrest, Tr. 567–69. See also Azarnoff, Tr. 653.

[60] *E.g.*, DeKornfeld, Tr. 2790–91; Lasagna, Tr. 4168, 4070, 4866.

from the two doses (650 mg. and 800 mg.) may be virtually the same (*e.g.*, Lasagna, Tr. 4866).[61]

The NAS/NRC Analgesic Review Committee recommendation on which American Home relies is not of much aid to respondents. That Committee simply felt that if an OTC drug is shown to work for one type of pain, it should be presumed to work for other types of pain as well and therefore should **[190]**be certified as a general-purpose analgesic product in the absence of contrary evidence. This was undoubtedly a sound, common sense expedience in the massive drug screening project, for which the Committee labored long and hard, *where the sole concern was efficacy, or lack of it, and not comparative efficacy.* Certainly that expedience cannot be transformed into a universal scientific proposition that study findings based on cancer pain, post-partum pain and post-operative pain apply to headache pain or other minor pain.[62] **[191]**

American Home's second proposition, that from a positive aspirin dose-response curve based on studies using various graded dosages (600, 900 and 1200 mg.) of aspirin it can be inferred that 800 mg. aspirin provides significantly superior analgesia than 650 mg. aspirin, is patently an inference and no more than an inference.[63] Although it may be based on rational and sound pharmacological reasoning and thus provide a reasonable basis for the claim, it certainly is not established as a scientific proposition. *This conclusion follows from the very function of dose-response curves and the way in which they are plotted.*

As discussed hereinabove, the function of any dose-response curve is to provide a convenient statistical basis for *guessing* the relative efficacy of dosages not actually studied. *Respondents' experts agree*

[61] See also Lasagna, Tr. 4249.

[62] Furthermore, to a layman at any rate, the subjective pain response model methodology suggests important inherent limitations. In view of the known difficulties attending the experimental pain study methodology (for example, using electric schocks on volunteer subjects), popularity of the subjective pain response model using such captive patient populations as terminal cancer, post-partum and post-operative patients is understandable from the standpoint of frequency and accessibility. However, it is useful to keep in mind that the patients studied are not representative samples of any group. Nor are the studies epidemiological studies. Moreover, pain relief does not lend itself to an objective and precise measurement by the use of uniform, standard units (as do blood pressure, pulse rate, blood count, etc.). Patients' subjective responses to any given pain impulse are bound to vary from one individual to the next. In addition, the eliciting and recording of patients' subjective responses require the intervention of nurses as observer-recorders, a human element of unknown reliability. The endemic problem of the high rate of placebo responders observed in those studies must be added to all this. They are generally in the 30% to 40% range, and can be as high as 57% (Lasagna, Tr. 4132). Despite the substantial scientific trappings in which it is clothed, it is fair to conclude that the subjective pain response model study is not an exact science. Granting its obvious utility for the purpose of setting a range for indicated dosage levels of an analgesic agent, it certainly falls far short of an objective, exact, scientific tool for the purpose of determining the *comparative* efficacy of drugs not tested. Indeed, several of respondents' experts suggested that a headache pain model study may not be sensitive enough to differentiate analgesia obtained by 650 mg. and 800 mg. aspirin (*e.g.*, McMahon, Tr. 3761; Lasagna, Tr. 4058–59). However, it is equally plausible to say that, for the relief of minor pain, there may not be any significant difference to be measured in the first place between 650 mg. and 800 mg. aspirin. See Lasagna, Tr. 4866.

[63] See p. 183 n. 45, *supra*.

that a dose-response curve is not designed to, and cannot, answer the question (1) whether the two dosages not tested will in fact perform differently or (2) whether, if they do, the differences will be statistically significant.[64]

The dose-response curve connecting the data points for graded dosages actually tested is simply a matter of connecting the two points representing statistically valid mean values at each data point tested. At each data point, the test data regarding individual test subjects ideally form a cluster. The degree of the spread of this cluster varies from one test to the next. It may be "sloppy" or "compact." Clinical pharmacologists then pick a mean point, based on a statistical analysis of the cluster, and connect it with another data point similarly arrived at (See F. 227 and 228). Thus, *if only two dosages are tested, the dose-response curve will be linear. However, if more than two are tested, the curve may not be linear* (Azarnoff, Tr. 665–66). In fact, the classical dose-response curve common to most active drugs is one that shows an increasing effect as the dosage is increased until a plateau is reached beyond which any increase in dosage does not produce an increase in effect (Lasagna, Tr. 4102). Furthermore, in many drugs, the "log dose" relationship is such that the dose effect is proportional to the logarithm of the dosage. In other words, a small **[192]**increase in dosage is not anticipated to produce any significant incremental increase in effect. This is believed to be the case with aspirin (Kantor, Tr. 3572–73, 3613–14; CX 367T). Therefore, *the precise shape of the aspirin dose-response curve must first be determined. Even then, it does not provide a scientific basis for claiming that the difference between any two dosage points not tested will be statistically significant. Only head-to-head clinical trials of the two points can provide that answer.* There is agreement on this point among both complaint counsel's and respondents' experts who testified in this proceeding.[65] The McMahon study, the only study which purports to provide an answer to that question, fell far short of its goal.

Thus, in a nutshell, even assuming the existence of a positive dose-response curve for aspirin, its precise shape is not known, and American Home has failed to overcome complaint counsel's *prima facie* showing that the superior efficacy of Anacin (800 mg. aspirin in two tablets) over regular aspirin (650 mg. in two tablets) is not established and that there exists a substantial question about that proposition.

[64] *E.g.*, Wallenstein, Tr. 3513; Kantor, Tr. 3647–49, 3565; Lasagna, Tr. 4271–73; Okun, Tr. 4475–76, 4493–94, 4522–23.

[65] *E.g.*, Forrest, Tr. 559–64; Azarnoff, Tr. 605–06; Wallenstein, Tr. 3513; McMahon, Tr. 3981; Lasagna, Tr. 4271–73; Okun, Tr. 4475–76, 4493–94, 4522–23.

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I am aware of the testimony of several practicing physicians suggesting that the findings of the aspirin dose-response studies, including the McMahon study, provide a sufficient basis for preferring 800 mg. aspirin over 650 mg. aspirin for the treatment of headache pain.[66] However, Dr. Lasagna, for example, admitted that the practice of medicine is not an exact science but an art, and that, as a clinician, he would form a professional judgment regarding the comparative efficacy of 650 and 800 mg. aspirin, based on the existing data, and would be willing to try 800 mg. instead of 650 mg. aspirin on his patients (Lasagna, Tr. 4172–76). This is as it should be in the practice of medicine. The application of clinical pharmacology to clinical medicine inevitably involves the professional judgment of the clinician and is a matter of trial and error based on long experience, insight and wisdom. However, this is not to say that the superior efficacy of 800 mg. aspirin over 650 mg. aspirin has been scientifically established.[67] **[193]**

In the final analysis, the record as a whole shows that, for the relief of mild to moderate pain, including headache pain, for which aspirin is indicated, 650 mg. and 800 mg. aspirin are about equally effective. The best that can be said for American Home is that the record evidence may provide a reasonable basis for a claim that 800 mg. aspirin may sometimes be expected to provide somewhat greater analgesia to some people than 650 mg. aspirin. However, that claim has not been scientifically established. This conclusion is in accord with the FDA OTC Internal Analgesics Panel's findings.[68] **[194]**

Finally, as a practical matter, the superior efficacy claim that consumers perceive from the challenged advertising representations

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[66] *E.g.*, Lasagna, Tr. 4893–95.

[67] Clinical pharmacologists generally demand that statistically significant differences be established first by well-controlled clinical demonstrations; they then determine according to their professional judgment, whether there is any clinical significance, taking into account such factors as the magnitude and duration of the observed difference, side effects, ease of administration and price (Forrest, Tr. 557–59, 568–69; Azarnoff, Tr. 650; DeKornfeld, Tr. 2825–27).

[68] The Panel answered the question as follows (CX 367T):

> . . . Dosages above 650 mg. [aspirin] do not result in a significantly greater incidence or degree of pain relief in most studies. In some studies, however, dosages of 975 mg. (four 325 [*sic*] mg. tablets) appeared to have a greater analgesic effect based on dose-response curves which appeared to be increasing above 650 mg. The difference between the larger dosages compared with 650 mg. generally could not be shown to be statistically significant but the apparent increase in the dose-response curve above 650 mg. dosages suggests that greater pain relief may be obtained in some individuals with some types of pain with single dosages of 975 mg. to 1300 mg.
>
> Although the dose-response curves in a few studies suggest that larger dosages may produce a slightly greater incidence of analgesia than 650 mg. dosages, there are important limitations in this assumption.
>
> First, the relationship of increased analgesia to increased dosage is not linear but, like many drugs, the effect is proportional to the logarithm of the dosage. Second, the increase is generally relatively small because the dose-response curve is relatively flat requiring large increases in the dosage to obtain a relatively small increase in analgesic response.
>
> A third consideration is that most studies of analgesic effects have involved only single dosages. There is relatively little information on the dose-response curves after multiple dosages.

See also *The Medical Letter*, CX 363; *The AMA Drug Evaluation*, CX 362.

is not that Anacin or APF provides a larger amount of pain relief than aspirin *in an absolute or technical sense,* but that the difference is *therapeutically significant* —that it makes a real difference which consumers can feel. Otherwise, why choose Anacin or APF and not aspirin, or pay a higher price for them? In this sense, the record evidence is convincing that the proposition that there is a *therapeutically* significant difference in pain relief between Anacin or APF on the one hand and aspirin on the other hand is far from being established. Indeed, on the basis of this record, one may arguably dispute the existence of any reasonable basis for that proposition.

More Aspirin Is Not Better But May Be Worse

The focus of analysis in this case has been upon whether or not the proposition "more is better"—specifically, the therapeutic superiority of 800 mg. aspirin over 650 mg. aspirin—is scientifically established. On the basis of the record evidence, I have reached a negative determination. The analysis in this respect compared the evidence of analgesic effects of graded, single aspirin dosages, totally ignoring the effect of multiple dosages or chronic use of aspirin. However, it should be pointed out that, in terms of chronic use, the record evidence strongly suggest that more aspirin may be worse than less aspirin. For example, aspirin-induced gastrointestinal lesions and mucosal erosions [**195**]have been endoscopically observed.[69] Aspirin's adverse effects on renal and hepatic functions, including salicylate hepatitis, are also well established.[70] So is aspirin's systemic effect on the blood, including its anticoagulant effect.[71] Some of these adverse effects can be serious indeed, especially for persons with certain predisposing conditions (F. 403, 411, 412 and 432). Indeed, the cumulative evidence related to the various adverse effects of aspirin (F. 403, 404, 406–20 and 426–52) compels the conclusion that aspirin is a potent drug and should not be taken in quantities larger than is effective for the condition for which it is indicated. Considered in conjunction with the remarkable popularity of OTC analgesic products among American consumers and their long-held faith in the products' efficacy and safety for the relief of ills,[72] not to mention

[69] *E.g.,* Grossman, Tr. 839–40; Shapiro, Tr. 2951–52. See also CX 367Z017–Z018.

[70] F. 450. It should also be noted that the side effects of aspirin on renal and hepatic functions are more closely tied with aspects of the disease activity rather than aspirin dosage and can result from small or normal doses (Plotz, Tr. 1083).

[71] F. 451 and 452.

[72] See, *e.g.,* CX 463 and CX 468. See also Rickels, Tr. 1196–97.

the substantial number of chronic users of aspirin including rheumatic persons,[73] the importance of the record evidence tending to show that "more may be worse" cannot be overemphasized.[74] **[196]**

Caffeine As An Active Agent Or An Adjuvant In OTC Analgesic Products

American Home contends that the presence of about 32.5 mg. caffeine in Anacin is another factor in support of its claim of Anacin's superior efficacy. However, the record evidence is persuasive that (1) there is no reliable medical-scientific evidence showing caffeine to be an effective analgesic agent in humans and (2) the medical-scientific evidence to show that an aspirin-caffeine combination is more effective than aspirin alone for analgesic purposes is insufficient.

It is generally agreed that caffeine, commonly ingested in the form of coffee or tea beverages, is a mild central nervous system stimulant as well as a cardiac stimulant.[75] As such, it is useful in fighting fatigue or sleepiness. There is evidence that caffeine acts on the kidney to produce diuresis and relaxes stomach muscles. It has also been reported to cause increased gastric secretion in the stomach and possibly contribute to gastric bleeding.[76] Caffeine also inhibits platelet aggregation in vitro.[77] When used alone in an adult oral dosage of 65 mg. not to exceed 600 mg. in 24 hours, caffeine is safe but ineffective as an OTC analgesic, antipyretic and/or antirheumatic ingredient.[78]

OTC analgesic products which combine aspirin and caffeine have been widely available for many decades. Anacin and the so-called APC tablets are common examples.[79] In spite of the popularity of APC and other aspirin-caffeine combinations, the pharmacological rationale for their use as analgesics is not clearly understood. It is claimed that caffeine is an effective analgesic agent in animals and is useful for the treatment of certain headaches **[197]**due to the

[73] F. 403.

[74] In this connection, the FDA OTC Internal Analgesics Panel recommended that the standard dosage unit of aspirin be determined to be 325 mg., that products containing 325 mg. aspirin per dosage unit be clearly labeled "Contains the standard strength of 325 mg. (5 gr.) aspirin per dosage unit," and that products containing an amount of aspirin other than 325 mg. aspirin per dosage unit be clearly labeled "Contains non-standard strength of X mg. (X gr.) aspirin per dosage unit compared to the established standard of 325 mg. (5 gr.) aspirin per dosage unit." CX 367-O.

[75] Okun, Tr. 4354–55.

[76] Grossman, Tr. 855–56; Shapiro, Tr. 2969; Lasagna, Tr. 4194.

[77] CX 367Z114.

[78] CX 367Z112.

[79] APC is a combination of aspirin, phenacetin and caffeine. Until the early 1960's, Anacin was an APC formulation. Anacin has since dropped phenacetin from its formulation and slightly increased its caffeine content to about 32 mg. (Shaul, Tr. 3321).

constriction of blood vessels in humans. Despite some clinical evidence that an aspirin-caffeine combination appears to perform better for some individuals and the historical feeling among many clinicians that caffeine has a legitimate function in an OTC analgesic product formulation,[80] caffeine has not been established as an effective analgesic agent. Also, there is insufficient clinical data to show that caffeine is an effective adjuvant when used in combination with aspirin for analgesic purposes.[81] This is in accord with the FDA OTC Internal Analgesics Panel's conclusion on this subject.[82]

On the other hand, there is evidence to show that an aspirin-caffeine combination may be pharmacologically unsound. For example, it is known that caffeine stimulates secretion of gastric juices and, thus, an aspirin-caffeine combination would exacerbate aspirin's adverse side effects on the gastrointestinal tract. Also, there is a possibility that caffeine could heighten a person's awareness of pain (Lasagna, Tr. 4973). **[198]**

In sum, the record evidence is clear that the efficacy of caffeine, either as an active analgesic agent or an adjuvant in an aspirin-caffeine combination, has not been scientifically established.

Respondent Did Not Have A Reasonable Basis For Making The Tension Relief Claim For Anacin And Respondent's Tension Relief Claim Was Not Only Unfair But Also False

With respect to the tension relief claim for Anacin, American Home's defense is not that it had a reasonable basis for making such a claim but that it did not make such a claim, either directly or by implication. For the reasons discussed heretofore, I have determined that respondent's advertisements contained the alleged claim. See pp. 170–72, *supra.*

The record as a whole clearly shows that Anacin will not relieve tension. Dr. Rickels, an eminent authority in the study of psychopharmacologic drugs, testified that aspirin or Anacin will not relieve

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[80] Dr. Okun, respondents' expert, suggested that caffeine liberates catecholamines, a group of hormones which cause analgesia in humans (Okun, Tr. 4358).

[81] In Dr. Moertel's clinical study of certain analgesic combinations using cancer pain, CX 361, an aspirin-caffeine combination was shown less effective than aspirin alone, although the difference was not statistically significant (Moertel, Tr. 968, 982).

Dr. DeKornfeld clinically compared aspirin, aspirin in combination with phenacetin, salicylamide with caffeine, and aspirin/phenacetin with caffeine. Although the combinations produced a mean pain relief score higher than aspirin alone, the difference was not statistically significant. See DeKornfeld, Tr. 2799–2803; CX 367Z113-Z114.

The Houde study using cancer pain, on which American Home relies, is inconclusive. Houde found that a combination of 210 mg. aspirin, 150 mg. acetominophen and 30 mg. caffeine gave somewhat better pain relief than either aspirin or acetaminophen alone. Houde, however, admitted that his data did not permit a conclusive statement that caffeine contributes to the efficacy of aspirin or acetominophen (Wallenstein, Tr. 3460–64, 3501–02, 3504–05, 3511–12; CX 367Z113-Z114).

[82] CX 367Z112-Z114.

tension or emotional anxiety (Rickels, Tr. 1205, 1209, 1236). Drs. Lasagna and Okun, respondents' experts, agreed with Dr. Rickels in this respect (Lasagna, Tr. 4100, 4198–99; Okun, Tr. 4437–38). In a well-controlled, double-blinded clinical trial evaluating the effects of aspirin on tension, aspirin was found not to be significantly superior to placebo in the relief of moderate tension (Rickels, Tr. 1194–98). Moreover, the study showed no difference in the results regardless of whether the study population was combined or broken down into those who also suffered moderate pain and those who did not.[83] (Rickels, Tr. 1197). The medical literature confirms that aspirin cannot be expected to relieve tension (Rickels, Tr. 1198, 1205). The FDA OTC Internal Analgesics Panel concluded that aspirin was "clearly ineffective" for "nervous tension" (CX 367K). Also, the FDA OTC Sedative Panel determined that aspirin was "ineffective" as a "day-time sedative" product, which was defined as one claiming "mood-modifying indications **[199]**such as 'for the relief of occasional simple nervous tension' " (CX 366E, Z002).

With respect to caffeine, Dr. Rickels testified that it would be "contraindicated" for a symptom of tension (Rickels, Tr. 1207, 1209). Although there is evidence that caffeine is a mild stimulant and relieves the feeling of fatigue to some extent, it does not provide any relief for tension.

However, American Home argues that Anacin is effective for pain-associated tension, a claim that it admits making. This claim refers to the so-called "tension-headache-tension" cycle, meaning a situation where headache pain is caused by underlying tension and the headache pain in turn causes further tension. Although aspirin or Anacin will relieve pain and thereby may cause some reduction in the irritability or tenseness resulting from pain, namely "secondary tension," this does not make aspirin or Anacin a tension relieving drug, a claim found to have been made by respondent. In this respect, Dr. Rickels explicitly testified that it "was not true" that "Anacin relieves headache pain and so its tension" or that Anacin "relieves tension as it relieves headache pain" (Rickels, Tr. 1236). Dr. Rickels' testimony stands undisputed. Since the claim is "not true," it follows that there can be no reasonable basis for the claim and that the claim is false.

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[83] Respondents' expert, Mr. Wallenstein, agreed that his study (RX 32) which compared two aspirin combinations, including an aspirin-acetominophen-caffeine combination, found that the caffeine combination data were "equivocal" (Wallenstein, Tr. 3501–02). Respondents' expert, Dr. Lasagna, agreed that RX 32's findings regarding the caffeine combination was inconclusive (Lasagna, Tr. 4217–18).

The Comparative Safety Of Micro-Fine And Buffered Aspirin Has Not Been Established

Also in issue in this case are two claims regarding Arthritis Pain Formula involving questions of drug formulations and comparative safety: the claims that APF will cause gastric discomfort less frequently than other OTC analgesic products (1) because APF is formulated with microfine aspirin particles and/or (2) because APF is formulated with two buffering agents (Paragraph 10(B) of the Complaint and 2(h) of Contested Issues of Fact). The subjective symptoms of gastric discomfort due to aspirin ingestion have been discussed in conjunction with other adverse effects of aspirin on the gastrointestinal tract (F. 363 and 406). The record evidence shows that the data in support of those claims of comparative safety are inconclusive at best and that the claims have not been established as medical-scientific propositions.

First, with respect to the first claim, although it is based on sound biopharmaceutical reasoning, it lacks supportive clinical data. It is of course theoretically plausible to hypothesize that the smaller the size of aspirin particles **[200]**the faster will be the rate of disintegration and absorption from the gastrointestinal tract and that, therefore, APF can reasonably be anticipated to cause less gastric discomfort than regular aspirin.[84] However, the crucial question is whether any statistically significant differences in terms of the incidence or severity of gastric discomfort have been established by well-controlled clinical demonstrations, and there is little scientific data one way or the other on this question.[85] Furthermore, it has been demonstrated that factors other than the size of the aspirin particles (for instance, the choice of excipient and the tablet compression during manufacture) may be important variables. The FDA OTC Internal Analgesics Panel, therefore, recommended a standardized dissolution test which can be used to detect preparations which will be so slowly absorbed as to potentially increase local adverse effects on the gastric mucosa or decrease efficacy due to decreased bioavailability.[86]

Second, with respect to the second claim that buffered aspirin causes less gastric discomfort than unbuffered or plain aspirin, the record shows a general consensus of a large number of studies which

[84] F. 362 and 364. See also Grossman, Tr. 851–52; Plotz, Tr. 1089–90; Sliwinski, Tr. 1136–37, 1165.

[85] F. 366, 368–70 and 378; CX 367Z006.

[86] See the Panel report, CX 367Z003-Z004.

Respondents' reliance on the blood level studies in support of the superior efficacy claims for Anacin and APF is not persuasive in that the record evidence is clear that no direct correlation between blood levels and analgesia has been shown with respect either to aspirin or to aspirin-caffeine combinations (F. 222 and 321–22).

demonstrate that buffered aspirin is more rapidly absorbed from the gastrointestinal tract.[87] The evidence also indicates that some persons who experience subjective symptoms of gastric distress may experience less gastric discomfort with some buffered aspirin than with unbuffered aspirin.[88] However, studies also indicate that simply adding buffers does not always increase the dissolution rate. The type and quantity of buffering [201]agents used, the tablet compression during manufacture, the choice of excipient and other pharmaceutical factors are also important variables. Therefore, actual testing of the dissolution rate is required to determine whether buffers present in APF actually affect the dissolution rate and, if so, to what extent. The totality of formulation and manufacturing variables of unbuffered and buffered aspirin products is crucial in determining their dissolution times.[89] Indeed, it has been shown that an adequately buffered aspirin may not have an advantage over a well-formulated unbuffered aspirin in terms of dissolution rate.[90] The discussions regarding the superior efficacy claim in terms of "establishment" in the preceding sections, apply here with equal force. See pp. 180–82, *supra.* In sum, in the absence of any well-controlled clinical study which demonstrates that APF tablets, with the two buffering agents in the quantities present in APF, cause gastric discomfort less often than unbuffered aspirin and show statistically significant differences between the two, the second comparative safety claim regarding APF has not been scientifically established.[91] This determination is in accord with the conclusion of the FDA OTC Internal Analgesics Panel.[92] [202]

The Studies Referred To In Certain Advertisements Do Not Prove That Anacin Is As Effective As The Leading Prescription Analgesic Product And More Effective Than Any Other OTC Analgesic Product

The two studies referred to in certain of the Anacin advertise-

[87] F. 373 and 374; CX 367Z005.

[88] F. 372–74.

[89] F. 362, 367 and 374; CX 367Z005.

[90] F. 373, 374 and 376; CX 367Z005.

[91] The only clinical study of APF conducted by American Home's Whitehall Laboratories (CX 304) failed to establish that APF causes a significantly less incidence of gastric discomfort than plain aspirin (Plotz, Tr. 1054–60; Sliwinski, Tr. 1138–47, 1162).

[92] CX 367Z099-Z100. See also *The Medical Letter*, CX 363; *AMA Drug Evaluations*, CX 362.

I am aware of the testimony in the record of some practicing physicians that their own clinical experience have convinced them that buffered aspirin causes subjective symptoms of gastric distress less often than unbuffered aspirin in some or many of their patients. This is generally consistent with the substantial amount of data reviewed by the FDA OTC Internal Analgesics Panel. However, I have determined that, with respect to a claim of *comparative* safety, as is involved herein, a greater degree of certainty is required and that nothing less than a well-controlled clinical demonstration satisfies this requirement.

ments (*e.g.*, CX 301 and CX 302) are the studies purporting to compare the analgesic efficacy of Anacin and Darvon Compound 65. Although the record shows that there is a general agreement among clinical pharmacologists that aspirin and aspirin-related products are as effective as Darvon Compound 65 for the relief of minor pain, the question in this case is whether the express or implied advertising representations that the two studies prove that Anacin is as effective as Darvon Compound 65 and more effective than any other OTC analgesic product have a reasonable basis.

The record clearly shows that neither CX 301 nor CX 302 proves the claim, let alone the implied claim that Anacin is more effective than any other OTC analgesic product. In order to prove the claimed parity with Darvon Compound 65, well-controlled clinical demonstrations are required. Neither CX 301 nor CX 302 can be reasonably said to qualify as a well-controlled study (F. 335–40). Similarly, neither study can be said to prove the implied claim of Anacin's superiority over other OTC analgesic products (F. 341–42).

Respondent's Survey Of Doctors Does Not Prove A Reasonable Basis For The Alleged Claims

It is my determination that the survey of doctors ("Doctors' Survey") referred to in some of the Anacin advertisements (*e.g.*, CX 81 through CX 84; CX 146 through CX 148; CX 176) and in Paragraph 21 of the Complaint does not provide a reasonable basis for the claims alleged in Paragraph 20 of the Complaint and found to have been made (F. 392–94).

The record clearly shows that the Doctors' Survey was so deficient in its design and execution that it could not provide any basis for the implied claim that more physicians recommended Anacin or that more specialists in internal medicine preferred it. The survey population was confined to physicians with a primary specialty in internal medicine who were in private practice and who were willing to receive promotional mail. The response rate was only about 10%. Obviously, such a mail survey does not provide any basis for the generalized claims found to have been made by American Home. Such a survey cannot be said to constitute reasonable substantiation for the alleged claims in any meaningful sense. **[203]**

Aspirin Disclosure Statements In Advertisements For Anacin And Arthritis Pain Formula Are Essential

An important issue in this case is whether the incidence and severity of adverse side effects of aspirin, either separately or

collectively, are of such magnitude as to make the presence of aspirin in Anacin and APF a material fact, within the meaning of Sections 5, 12 and 15 of the FTC Act, which should be affirmatively disclosed in future advertisements for the products. Section 15 of the Act provides in effect that a fact may become "material" in light of the "consequences which may result from the use of the commodity to which the advertisement relates" under "customary or usual" conditions. There is a vigorous dispute among the parties as to both the incidence and severity of adverse side effects and the utility of an advertising disclosure requirement, especially in view of the fact that the labels for Anacin and Arthritis Pain Formula list aspirin (or its chemical denomination "acetylsalicylic acid") as an ingredient, in accordance with FDA labeling regulations.

Aspirin is said to be the most popular OTC drug in this country. It is estimated that almost 19 billion dosage units are sold annually: this means over 5 million units a day. Without a doubt, aspirin is a highly effective and relatively safe analgesic agent. Its versatility and usefulness in terms of a risk-benefit ratio have been established over many decades. However, aspirin is also a potent drug and has a number of serious adverse side effects. Numerous expert witnesses in this case discussed the nature and extent of the principal side effects (F. 403, 404, 406–20, and 426–52). The FDA OTC Internal Analgesics Panel's report contains a handy compendium of aspirin side effects in eight major areas of concern (CX 367Z013-Z041). They include: effects on various organ systems such as the gastrointestinal tract, central nervous system, kidney, liver and the blood; specialized effects on hypersensitive persons, persons with certain disease states or during pregnancy; and effects when used with other drugs (See F. 406, 426, 444, 448 and 450–52). Some of these side effects are known to be serious and even life-threatening to many high risk subjects. The record shows that aspirin-induced or related hospital emergencies have reached alarming proportions. For example, in a recent survey, aspirin was found to be the second most frequent drug involved in adverse effects of drugs that were serious enough to require hospitalization. Two out of every 1,000 hospital admissions were attributed to aspirin (CX 367Z022). **[204]**

Consonant with its concern about the varied and substantial adverse effects of aspirin, the FDA OTC Internal Analgesics Panel recommended that appropriate warnings and cautionary statements be included on labels of all aspirin-containing OTC products (CX 367Z123-Z124). A number of these warnings and cautionary statements say that aspirin-containing products should not be taken under certain conditions or by certain persons without a prior

consultation with a physician. For the consumer to whom the warnings and cautions are intended, his knowledge that a given product contains aspirin is crucial. However, the record clearly shows that a large number of consumers are unaware of the fact that many OTC analgesic products, including Anacin, contain aspirin and that a large number of consumers neglect to read labels of such products (F. 402 and 457–64). These facts, involving important questions of public health, make aspirin ingredient disclosure highly desirable in all advertisements for aspirin-containing OTC products. In my view, the frequency and severity of two types of adverse effects, which can be life-threatening, make such advertising disclosure mandatory. They are aspirin-induced massive gastrointestinal bleeding and acute asthmatic attacks in aspirin-intolerant persons [93] (F. 410, 412–14, 426 and 428).

A. *Aspirin-Related Massive Gastrointestinal Bleeding*

Although the mechanism of action of aspirin upon the gastrointestinal tract resulting in sudden, massive bleeding is not definitively understood (F. 411), it is generally agreed that orally administered aspirin, as well as intravenously administered aspirin, can cause sudden, massive and life-threatening bleeding in the gastrointestinal tract, especially in persons with certain predisposed conditions such as dyspepsia, gastrointestinal lesions, peptic ulcers or other bleeding problems in the gastrointestinal tract (F. 413).

A recent survey showed aspirin to be the second most frequent drug involved in all hospitalizations due to the adverse effects of drugs. Two out of every 1,000 such **[205]**hospital admissions were attributed to aspirin. Massive gastrointestinal bleeding was second only to digitalis intoxication as the most frequent cause of drug-related hospitalization and aspirin and aspirin-containing products were involved in 60% of the cases.[94] Moreover, the mortality rate associated with this condition is high. Death occurs in 4 to 10% of all patients with massive gastrointestinal bleeding, including those associated with aspirin ingestion.[95] Even higher mortality rates are shown in those patients who require surgical intervention to stop the massive internal bleeding (CX 367Z022). Furthermore, there is evidence that aspirin can cause gastric ulcers when taken in large

[93] The record shows that a relatively small amount of aspirin (3 mg.) can cause a severe reaction, including anaphylactic shock, in aspirin-intolerant persons (F. 426 and 429).

[94] CX 367Z022. See also Dr. Grossman's discussion of Miller, "Hospital Admissions Due to Adverse Drug Reactions - A Report From The Boston Collaborative Drug Surveillance Program," *Clinical Pharmacology and Therapeutics*, 14:142–143, 1973 (Grossman, Tr. 877–80; CX 367Z022); F. 418.

[95] F. 414.

doses and aspirin may cause a specific kind of ulcer not seen in its absence.[96] Gastric ulcer is a serious disease with significant morbidity, and often requires surgery on the stomach.[97] By conservative estimate, aspirin ingestion results in 10 out of every 100,000 users developing a gastric ulcer, requiring hospitalization.[98] Levy's Boston Collaborative group study also estimated that one-eighth of all gastric ulcers were aspirin-related (CX 367Z020). Although these incidences are relatively small in terms of absolute numbers, they clearly present a serious public health problem. Therefore, the FDA OTC Internal Analgesics Panel recommended that all products containing aspirin should bear a warning: "*Caution*: Do not take this product if you have stomach distress, ulcers or bleeding problems except under the advice and supervision of a physician." (CX 367Z025). The aspirin-related gastrointestinal massive bleeding is compounded by aspirin's recently known anticoagulation effect (CX 367Z015). **[206]**

B. *Aspirin Intolerant Individuals*

Aspirin hypersensitivity reactions (or aspirin-intolerant reactions) are varied. They include: effects on the respiratory tract ranging from shortness of breath to severe asthmatic attacks; effects on the skin such as urticaria, angioedema, edema and rash; and anaphylactic shock involving laryngeal swelling, blockage of air pathways and a sudden drop in blood pressure which can result in death if not treated rapidly (F. 426 and 444). Although the incidence of aspirin intolerance in the general population is relatively small, it clearly presents a serious and substantial problem of public health. Therefore, the FDA OTC Internal Analgesics Panel recommended that labels for all products containing aspirin include the warning: "This product contains aspirin. Do not take this product if you are allergic to aspirin or if you have asthma except under the advice and supervision of a physician." (CX 367Z029). Dr. Moertel testified that the existence of aspirin in OTC analgesic products should be disclosed in advertising in order to protect persons with gastrointestinal bleeding or bleeding problems and aspirin-intolerant persons (Moertel, Tr. 1012).

In addition, in 1973 the American Academy of Allergy, a professional body composed of some 2,200 allergy specialists in the United States, adopted a resolution recommending that a "formulation containing aspirin and advertisements promoting the formulation

[96] F. 415.
[97] F. 416.
[98] F. 417.

should clearly indicate that the preparation contains aspirin and that aspirin can be harmful to some persons." (CX 367Z028; Farr, JTr. 2608–13). The FDA OTC Internal Analgesics Panel expressed its agreement with this resolution (CX 367Z028–Z029).[99] The 1973 resolution of the American College of Allergists, another professional body composed of allergy specialists, is also in accord with the 1973 resolution of the American Academy of Allergists (F. 446; Farr, Tr. 2613, 3650).

Against the unamimous judgment of two responsible professional organizations of specialists and the FDA OTC Internal Analgesics Panel, American Home argues that such advertising disclosure is totally unnecessary because **[207]**(1) the incidence of aspirin intolerance or massive gastrointestinal bleeding is small and (2) consumers can be counted on to read OTC drug labels. These arguments are unacceptable.

First, with respect to aspirin-intolerance, the incidence figures for asthmatics in the record varies from a low of 0.1% to a high of 28%.[100] Even if we were to take the low range, it represents close to one-quarter of a million persons who will suffer a severe adverse reaction from aspirin ingestion, which can be life-threatening. When we take into account the significant number of people who may suffer serious gastrointestinal side effects, the considerations for mandating advertising disclosure of aspirin content is overwhelming.

Respondents' argument that consumers know that Anacin and APF contain aspirin is unpersuasive. There is evidence that a substantial portion of consumers do not know that OTC analgesic products, such as Anacin, contain aspirin. This is not surprising in view of the long history of Anacin advertisements which carefully avoided any hint that it contains aspirin and suggested by implication that its analgesic ingredient is something special and that it is something other than aspirin.[101] Similarly unpersuasive is respondents' argument that those consumers who should not take aspirin are advised not to take aspirin and instructed to read labels by their physicians. First, many aspirin-intolerant persons are not aware of their condition in this respect until they experience a severe adverse reaction.[102] Second, the number of consumers who do not read labels

[99] The Panel also "strongly urges the Federal Trade Commission to require that cautionary language and warnings developed by the Panel be given emphasis in commercial advertising more so than is currently being done . . . ." (CX 367L).

[100] Stevenson, JTr. 1495. Dr. Stevenson testified that 10% is a conservative figure. The record as a whole supports the conclusion that 10% is probably the best estimate. On this basis, the number of persons who are aspirin intolerant reaches some 2.25 million.

[101] See the discussion of Anacin and APF advertisements, pp. 168, 173–74, *supra*.

[102] F. 455.

before they take an OTC product is as large as, if not larger than, those who read the labels.[103]

Finally, the presence of aspirin in Anacin and APF is a material fact from an economic point of view. The record shows that a substantial number of consumers do not know that [208]the analgesic ingredient in Anacin and APF is aspirin. Obviously, if this fact were known to consumers, that fact would be an important factor in making a choice between higher priced Anacin/APF and lower priced aspirin. In this sense as well, the presence of aspirin in Anacin and APF is a material fact which ought be disclosed in future advertisements.

Thus, the record evidence clearly establishes in my view the necessity of aspirin ingredient disclosure in Anacin and APF advertisements.

Caffeine Safety—Caffeine Disclosure Statements In Advertisements For Anacin Are Not Required

The record shows that caffeine when used as an adjuvant is safe at a single dose of 65 mg. not to exceed 600 mg. in 24 hours. The recommended dosages of Anacin is within this range.[104] Although chronic caffeine toxicity has not been observed in humans, some resistance to caffeine is known to develop. Tolerance to caffeine is likely to develop with daily use. Caffeine is a cardiac stimulant. It is known to cause increased gastric secretion in the stomach and possibly contribute to gastric bleeding. It has been suggested that caffeine can cause peptic ulcers and should be avoided by patients with peptic ulcers.[105] Caffeine inhibits platelet aggregation in vitro and its use in patients with gastric bleeding is not recommended.[106] Caffeine also is associated with an increase in blood pressure and keeping users awake or jittery.[107]

Complaint counsel maintain that the public is seriously concerned with the effects of caffeine and desires to avoid ingestion of caffeine-containing products. They further argue that the public is entitled to a caffeine disclosure statement in all Anacin advertisements. However, the record does not show that the incidence and severity of adverse effects of caffeine are of such magnitude as to require an [209]advertising disclosure of the kind complaint counsel advocate. Although the record contains some evidence that a substantial

[103] F. 464.
[104] F. 424; Lasagna, Tr. 4098–99.
[105] Grossman, Tr. 872–75; Lasagna, Tr. 4194.
[106] Grossman, Tr. 866–67. See also CX 367Z114.
[107] Lasagna, Tr. 4194.

segment of the public may desire to avoid caffeine ingestion for one reason or another, the record as a whole does not support a conclusion that the adverse effects of caffeine are such as to present a serious public health problem.[108] After all, complaint counsel do not dispute that the amount of caffeine in two tablets of Anacin (about 65 mg.) is smaller than that present in a single cup of coffee. In my view, the record as a whole does not support a conclusion that the presence of caffeine in Anacin is a material fact of which the failure to disclose would make Anacin advertisements unfair or deceptive.

Furthermore, there is a practical problem of requiring an advertising disclosure for caffeine on top of a similar disclosure for aspirin. As a practical matter, television and radio commercials are usually of a short duration, lasting for 30 to 60 seconds. In my view, to add the caffeine disclosure requirement may have the undesirable effect of diluting the impact of aspirin disclosure, a much more important message, and blurring its focus. Also, there is a real practical problem in requiring multiple affirmative disclosures in a single, short commercial. Accommodation of the two ingredient disclosures in a short commercial may present difficult, if not insurmountable, technical problems.

Finally, an affirmative disclosure requirement is a form of prior restraint upon commercial speech and should not be lightly imposed in the absence of a clear showing that non-disclosure would make the advertisement unfair to the consumer or deceptive. The record as a whole fails to make out such a showing in my view. Therefore, complaint counsel's arguments for a caffeine disclosure requirement are rejected. **[210]**

The Unfairness Doctrine And The Substantial Question Theory

Complaint counsel argue that a comparative or superlative claim of efficacy or safety of an OTC analgesic product, made expressly or by implication, constitutes, as a matter of law, a representation that the claim is scientifically established. They further argue that, with respect to the comparative efficacy claim for Anacin and the comparative safety claim for APF, the claims are not established because there exists a substantial medical-scientific question about their validity among scientists who by their training and experience

[108] F. 421–25. The General Foods study (CX 471—received *in camera*) is less than persuasive on this point. In my view, there is a real question whether the study's findings can be transferred in a meaningful sense to a drug. While coffee is a beverage of refreshment nature, Anacin is a drug to be taken for specific physical conditions. The record contains scant evidence as to the extent of caffeine concern, if any, among consumers of OTC analgesic products or medical experts.

are competent to judge the validity of such claims. Complaint counsel finally argue that the existence of a substantial question is a material fact and that an advertisement which carries such a comparative claim without disclosing the existence of a substantial question is not only false within the meaning of Sections 12 and 5 of the FTC Act but also an unfair act or practice within the meaning of Section 5. At first blush, this theory of Section 5 liability is a novel one.

Upon reflection, however, I am persuaded that the substantial question theory outlined hereinabove is, in the particular factual context of this case, a reasonable and logical refinement of the "reasonable basis" doctrine, which has been judicially sanctioned. *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); *National Dynamics Corp.*, 82 F.T.C. 488 (1973), *aff'd*, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974).

The basic rationale of *Pfizer* is that an affirmative product claim carries with it an implied representation that the advertiser possessed and relied on a reasonable basis for the claim when the claim was made and that such an advertising claim in the absence of a reasonable basis is an unfair act or practice in violation of Section 5 within the meaning of Section 5. See *FTC* v. *Sperry & Hutchison Co.*, 405 U.S. 233 234 (1972). The reasonable basis requirement applies even if an advertisement claim is in fact true. 81 F.T.C. at 63. Also see *id.* at 67–68.

In *Pfizer*, a case involving a simple efficacy claim for a topical OTC anesthesic preparation, the Commission reasoned that (81 F.T.C. at 62): **[211]**

> Given the imbalance of knowledge and resources between a business enterprise and each of its customers, economically it is more rational, and imposes far less cost on society, to require a manufacturer to confirm his affirmative product claims rather than impose a burden upon each individual consumer to test, investigate, or experiment for himself. The manufacturer has the ability, the knowhow, the equipment, the time and resources to undertake such information by testing or otherwise—the consumer usually does not.
>
> * * * Absent a reasonable basis for a vendor's affirmative product claims, a consumer's ability to make an economically rational product choice, and a competitor's ability to compete on the basis of price, quality, service or convenience, are materially impaired.

The Commission, therefore, concluded that as a matter of marketplace fairness, a consumer is entitled to rely upon the manufacturer to have a reasonable basis for making performance claims. *Id.*

In determining what constitutes "a reasonable basis," the Commis-

sion set forth a number of guidelines in *Pfizer*. First, the Commission made it clear that the requirement is not solely a "reasonable man" test. The reasonable basis requirement questions both the reasonableness of an advertiser's actions and the adequacy of evidence upon which such action is based.[109] The reasonable basis standard is essentially a fact issue to be determined on a case-by-case basis, and depends on such overlapping considerations as: (1) the type and specificity of the claim made (*e.g.*, safety, efficacy, dietary, health, medical); (2) the type of product (*e.g.*, food, drug, potentially hazardous products); (3) the possible consequences of a false claim (*e.g.*, personal injury); (4) the degree of reliance on the claim by consumers; and (5) the type and accessibility of evidence adequate to form a reasonable basis for the particular claim.[110] For some types of claims and for some types of products, the only reasonable basis "in fairness and in the expectation of the consumers" would be an adequate and well-controlled scientific test.[111] **[212]**

This proceeding involves comparative and superlative efficacy and safety claims for aspirin-based OTC internal analgesic products. Such drugs as a class is known to be the most popular OTC drug in this country. American consumers purchase some 19 billion dosage units annually (F. 14). Although they are generally safe and effective for the relief of minor pain and headache pain and for the reduction of inflammation and fever, they are potent drugs and have numerous adverse side effects, some of which are serious and can be life-threatening (F. 404 and 406–52). Anacin is the largest selling and most heavily advertised aspirin-based OTC internal analgesic product. Against this background, what is the reasonable level of substantiation required under the fairness doctrine for a claim that Anacin is more effective than aspirin because of the extra amount of aspirin (150 mg.) and caffeine (65 mg.) contained in two tablets of Anacin over two tablets of 5 gr. aspirin, or for a claim that Anacin is more effective than any other OTC analgesic product?

Consumers obviously have no means of verifying the truth of such a pharmacological-clinical superiority claim for themselves (See F. 210, 211, 218–20, 223, 225, 581 and 582). Moreover, consumers are willing to pay, and do pay, a significantly higher price for the alleged superior efficacy of the product. If the alleged superiority is not established, the consumer's evidently widespread self-medication with such higher-priced, "extra-strength" OTC analgesic products is not only pharmacologically superfluous and economically wasteful

[109] See *id.* at 64.
[110] *Id.* at 64.
[111] *Id.* at 64, 66–67.

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but also is accompanied by significant health hazards (increased potential for adverse side effects) (See F. 403–52).

In my view, in the circumstances of this case, such a comparative or superlative claim constitutes, "in fairness and in the expectation of the consumers" and as a matter of law, an implied representation that the manufacturer has a sufficient kind and degree of substantiation for its claim. To state it another way, the consumers of OTC analgesic products are entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a sufficient kind and level of substantiation for the claim. In the circumstances of this case, the only sufficient substantiation for the claim is that the claim is accepted as established by the medical-scientific community. The record is clear that, with respect to OTC internal analgesic products, the medical-scientific community requires two or more well-controlled **[213]**clinical studies using appropriate pain models, one of which is a headache pain model (F. 197–225).

It is also clear that the absence of that kind and level of substantiation leaves a substantial question regarding a claim of comparative or superlative efficacy or safety, and that the existence of such a question is a material fact, of which the failure to disclose will render an advertisement deceptive (See pp. 216–17, *infra*). What then is a substantial question? A substantial question is a fact issue to be determined on a case-by-case basis. In this case, complaint counsel argue essentially that a substantial question exists because the comparative or superlative efficacy or safety claim is not accepted as true or as a proven scientific fact by the vast majority of medical scientists who are by their training and experience competent to judge the scientific validity of such claims. In this sense, a substantial question does not mean unanimity of medical-scientific opinions. Nor do occasional dissents make out a substantial question. It relates rather to the quality and quantum of medical-scientific evidence in support of a proposition. In the field of clinical pharmacology, it is generally agreed that two or more well-controlled clinical demonstrations showing statistically significant results are sufficient to establish a medical-scientific proposition. The record as a whole shows that in the absence of that level of supporting data, the medical scientists are unwilling to accept a proposition as true or proven. The expert witnesses who testified in this proceeding virtually without exception supported this view.

American Home, on the other hand, contends that the existence of a substantial question requires more, that it requires a substantial amount of *negative* data from well-controlled clinical studies (RB at

6). However, this position is contrary to the weight of record evidence in this case[112] (See F. 195, 223, 225, 260–62, 276–78 and 318–20).

Furthermore, the rationale of the substantial question theory as applied to advertising claims for comparative or superlative efficacy or safety of OTC analgesic products is not only consistent with congressional policy of drug regulation embodied in the 1962 Amendment to the Food, Drug and Cosmetic Act and implemented by the FDA, but also is consonant with the findings and recommendations of the FDA OTC Internal Analgesics Panel. [214]

In Section 505(d) of the Food, Drug and Cosmetic Act, as amended (21 U.S.C. 355), Congress mandated a "substantial evidence" standard for granting a new drug application (NDA) with respect to all drugs, including new OTC drugs. Congress defined "substantial evidence" of drug efficacy in Section 505(d) as

> evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and reasonably be concluded by such experts that the drug will have the effect it purports or is represented to have . . . .

Under the HEW regulations promulgated to implement that congressional policy, the FDA has set forth several principles which, in its words,

> have been developed over a period of years and are recognized by the scientific community as essentials of adequate and well-controlled clinical investigations. They provide the basis for the determination whether there is "substantial evidence" to support the claims of effectiveness for "new drugs" . . . . 21 CFR 314.111(a)(5)(ii).

It should be pointed out that many of the FDA's "principles" closely parallel the very criteria testified to by the expert witnesses in this proceeding as important elements of a well-controlled clinical study. *Cf.* 21 CFR 314.111(a)(5)(ii)(a) through (c) and F. 201–17. Furthermore, these FDA requirements have been consistently upheld by courts. See *e.g., Weinberger* v. *Bentex Pharmaceutical, Inc.,* 412 U.S. 645 (1973); *Ciba Corp.* v. *Weinberger,* 412 U.S. 640 (1973); *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 (1973); *United States* v. *Articles of Food and Drug Consisting of Coli-Trol 80, etc.*, 518 F.2d 743 (5th Cir. 1975); *Sterling Drug, Inc.* v. *Weinberger,* 503 F.2d 675 (2d Cir. 1974).

These well-established criteria for establishing the effectiveness of new prescription and non-prescription drugs have been recently reaffirmed by the FDA when it promulgated review procedures for

[112] With respect to aspirin's dose-response curve, the record contains a substantial amount of such negative clinical test data. *E.g.*, F. 243–57.

OTC drugs by various panels of experts, including the Panel on Analgesic, Antipyretic and Antirheumatic Products, and when the FDA initiated rulemaking proceedings **[215]**known as "monograph" proceedings. See 21 CFR 330.10(a)(4)(ii). Pursuant to this mandate, the FDA OTC Internal Analgesics Panel set forth specific criteria for well-controlled clinical studies required to establish the efficacy and safety of active agents used in OTC analgesic products. The Panel's criteria closely resemble the criteria extensively testified to by various experts, including American Home's, at trial in this proceeding.[113] More specifically, "to establish Category I status for a Category III compound,"[114] the Panel required "at least two studies by independent investigators" (CX 367Z075) which conformed to a number of specific criteria. These criteria are virtually identical to the ones testified to by expert witnesses in this proceeding. *Cf.* CX 367Z074–075 and F. 200–17.

Thus, the FDA, pursuant to congressional policy embodied in the Food, Drug and Cosmetic Act, requires at least two well-controlled clinical demonstrations of efficacy for both new prescription drugs and new OTC drugs. The FDA has reaffirmed the same standard in connection with its OTC drug review with respect to the issue of *simple* efficacy. The FDA OTC Internal Analgesics Panel recommended the same standard for OTC analgesic products for labeling with respect to the issue of *simple* efficacy and safety. It is eminently reasonable, therefore, for the Commission to apply the same standard to advertising claims of *comparative* or *superlative* **[216]** efficacy or safety for OTC analgesic products involved in this proceeding.[115]

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[113] Although the specific task of the Panel was to determine the effectiveness and safety of active ingredients used in OTC analgesic products for labeling purposes, the Panel dealt with issues of comparative efficacy or safety on several occasions, applying the same criteria. *E.g.*, CX 367Z110–Z111 ("faster to the bloodstream" issue); CX 367Z075 (greater analgesia postulated for aspirin-caffeine combination drugs).

[114] Category I was defined as "generally recognized as safe and effective," Category II as "not generally recognized as safe and effective," and Category III as "conditions for which the available data are inconsistent to permit final classification [either as Category I or II] at this time." (CX 367C-D).

[115] American Home argues that since Anacin and APF are effective and safe for the indicated conditions, it is not equitable to require a standard higher than a reasonable basis for comparative claims for these products (RRB, at 6–10). While this argument has some surface plausibility, it pales before the compelling rationale of the unfairness doctrine discussed hereinabove. On the contrary, in view of this record, it would be unthinkable for the Commission to allow a lesser standard for *comparative* claims in advertisements than what the FDA requires for *simple* (or absolute) claims in labels. To do so may tend to encourage OTC drug manufacturers to make unnecessary and therapeutically insignificant modifications to well known drugs, all having the same general actions or similar efficacy or safety factors, in order to achieve some marketing advantage as a result of advertising designed to emphasize the modifications and thereby imply superior product performance. In my view, this does not seem to be consistent with the basic purposes of Sections 5 and 12 of the FTC Act.

The Establishment Claims Related To Anacin And APF Will Be Deceptive Unless Qualified By An Affirmative Disclosure Of the Existence Of A Substantial Question

It is axiomatic that the Commission's power under Sections 5 and 12 to proscribe deceptive or misleading advertisements includes the power to require affirmative disclosure of a material fact in future advertisements of a product claim. In this sense, a fact is material if non-disclosure of that fact makes a claim patently deceptive and misleading. *E.g., ITT Continental Baking Co.,* 83 F.T.C. 865, 965 (1973), *rev'd in part,* 532 F.2d 207 (2d Cir. 1976); *FTC* v. *Royal Milling Co.*, 288 U.S. 212, 216–17 (1933); *Pep Boys-Manny Moe & Jack Co.* v. *FTC,* 22 F.2d 158, 161 (3rd Cir. 1941). *Cf., National Commission On Egg Nutrition,* 88 F.T.C. 89, 192–94 (1976), *modified,* 570 F.2d 157 (7th Cir. 1977). In this case, an establishment claim, express or implied, would clearly be misleading and deceptive unless qualified by disclosure of the fact that a substantial question exists regarding its scientific validity.

The record shows that the only scientifically established analgesic ingredient in Anacin and APF is aspirin. Respondents impliedly claimed that the propositions that Anacin and [217]APF are more effective or safer than aspirin have been scientifically established. These claims are based on the differences in formulation between Anacin/APF and aspirin. Respondents' unqualified claims in this regard imply that the difference in formulation, or rather the slight modification made to a regular aspirin tablet (150 mg. additional aspirin in Anacin), provides therapeutically superior analgesia. In the circumstances of this case, the fact that the implied claims have not been scientifically established, or that there is a substantial question among scientists who by training and experience are qualified to evaluate the validity of such claims, is a material fact which must be disclosed to consumers. The fact that there is a substantial scientific question is a vital factor for consumers in making their purchasing decisions.

The existence of a substantial question discussed above is even more material, indeed crucial, in this case because consumers cannot be expected to evaluate the validity of these establishment claims. Faced with an unqualified establishment claim, consumers are unable to make the intelligent and informed choice that is a paramount objective of Section 5. See p. 212, *supra.*

American Home's Constitutional Objections To The Substantial Question Theory Are Without Merit

American Home has raised two major objections to the substantial question theory on constitutional grounds. First, it argues that the establishment standard is vague and unpredictable and, thus, violative of due process. Second, it argues that the establishment standard is an invalid prior restraint on constitutionally protected commercial speech (RB 18–23). In my view, these arguments are without merit.

First, it is clear from the discussions in the preceding sections that the substantial question theory in the context of this case requires of American Home for advertising purposes nothing more than the quality and quantum of medical-scientific evidence long required by the FDA with respect to all new drugs (both prescription and non-prescription drugs) for labeling purposes. This standard is both well-established and clearly defined, and has been judicially reviewed and sanctioned. All American Home need do to meet the substantial question test is to have that kind and level of medical-scientific evidence (essentially two or more well-controlled [218]clinical demonstrations) which will establish its comparative or superlative claim when such claim is made.[116] There is nothing vague or unpredictable about this standard.

With respect to the fact that the performance claim challenged in this case is an implied claim rather than an express one, it clearly does not rise to the level of vagueness in the due process sense. Findings of Section 5 liability involving implied advertising claims have been upheld by the Supreme Court in numerous cases throughout the history of Section 5 jurisprudence. Therefore, American Home's vagueness argument is rejected.

Secondly, American Home's free speech argument is not well founded. It is well established that so-called commercial speech is entitled to the full protections of the First Amendment. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Counsel,* 425 U.S. 748 (1976). However, it is also well established that commercial speech that is false or misleading forfeits that protection. *Id.* at 771 n. 24; *Warner-Lambert Co.* v. *FTC,* 562 F.2d 749 (D.C. Cir. 1977), *reversing in part, Warner-Lambert Co.,* 86 F.T.C. 1398 (1975), *cert. denied,* 46 U.S.L.W. 3616 (April 14, 1978); *National Commission on Egg Nutrition,* 88 F.T.C. 89, 195–99 (1976), *modified,* 570 F.2d 137 (7th Cir. 1977).

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[116] During the oral argument, complaint counsel agreed that two or more well-controlled clinical studies supporting such claims when they are made will constitute an absolute defense in a substantial question action under Section 5. See Transcript of Oral Argument, Tr. 7842–46.

In the cases involving commercial speech, the important test is whether the proposed prior restraint will prohibit truthful speech or otherwise unduly tend to inhibit truthful speech. In this proceeding, it was found that respondents' comparative claims of superior efficacy and safety have not been established and that the existence of a substantial question with respect to these advertising claims is a material fact, of which the failure to disclose would render the advertising claim deceptive and misleading. In these circumstances, the requirement for affirmative disclosure of that material fact is well within the long established proscription against deceptive commercial speech.[117] American Home's argument **[219]**that such a requirement in the context of the substantial question theory would have the effect of chilling truthful speech is, therefore, without merit.

Finally, the constitutional challenge against the reasonable basis requirement is misdirected for the reason that the tension relief claim in this case not only lacked a reasonable basis but also is false.

Anacin's Product Image—Source And Duration And The Corrective Advertising Requirement

Complaint counsel contend that: (1) a substantial number of consumers believe that Anacin is a more effective pain reliever than aspirin and is a tension reliever; (2) these mistaken images are due in substantial part to American Home's misleading advertising claims made over a long period of time; (3) these consumer images will persist in the absence of corrective advertising designed to convey to consumers a corrective message that Anacin's superior efficacy is not established and that Anacin will not relieve tension. Respondent vigorously argues that: (1) the record evidence does not demonstrate consumers' belief that it has been established that Anacin is a more effective drug than aspirin or their belief that Anacin is a tension-relieving drug; (2) the record evidence does not show that the challenged advertising claims were the principal or significant source of such images, if such images were found to exist; and (3) the corrective advertising proposed by complaint counsel would have a punitive effect and is unjustified. It is my determination that: (1) the record as a whole does not support anything more than an inference that consumers have the establishment image alleged by complaint counsel; (2) the corrective advertising directed to the superior

[117] During the oral argument, respondents' counsel agreed that if the record supports a finding that the existence of a substantial question is a material fact, the requirement for affirmative disclosure of that fact would be consistent with the constitutionally sanctioned proscription against deceptive advertising under Section 5 of the FTC Act (Transcript of oral argument, Tr. 7896–97).

efficacy image is, thus, not justified; (3) the record as a whole supports the conclusion that consumers believe Anacin to be a tension reliever; and (4) the corrective advertising directed to the tension relief image is justified. [220]

A. *Product Images, Sources And Duration*

In my view, the mere fact that American Home has disseminated the challenged advertising claims for a long period of time (at least since 1963) supports a fair inference that consumers will believe that Anacin is a more effective analgesic drug than aspirin and that Anacin is a tension reliever.[118] This inference is further confirmed by some empirical data in this case, although such empirical evidence is less than overwhelming.

First, the record as a whole clearly supports the conclusion that consumers have for some time believed that Anacin is a more effective analgesic drug than aspirin and is a tension reliever. A number of commercial market research documents in evidence, including CX 451, 452, 454 and 455, support that conclusion. Although these market surveys were conducted at various times during the 1967 to 1970 period, for different clients, by different firms, using different methodologies and drawing upon different samples, they produced fairly consistent results. Although they were neither perfectly designed nor flawlessly executed, they were in general of the kind and quality normally used by business firms to help guide their marketing efforts (Smith, Tr. 5948–50). See also F. 502 and 503. An analysis of the data pertaining to efficacy-related product attributes shows that consumers believed that Anacin was a more effective drug than aspirin (F. 521, 523, 524 and 568–70).

Second, *The Leavitt Study* (CX 457), conducted for complaint counsel in 1975 for use in this litigation, provides further confirmation. Although *The Leavitt Study* suffers from a serious and major defect in that the completion rate was only about 50%, it nevertheless shows that more than one-half of the survey population (between 56 to 60%) had a comparative image of Anacin and aspirin, and that among them a significantly larger segment believed Anacin to be more effective than aspirin (F. 530 and 550–67).

The Leavitt Study is less impressive with respect to the tension relief image, but it produced spontaneous [221]responses from a not insignificant number of respondents, indicating that the tension relief image did exist in the fall of 1975 (F. 525). This is noteworthy

[118] *Cf. Warner-Lambert Co.*, 86 F.T.C. 1398, 1501–02, 1503 (1975), *rev'd in part*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3616 (U.S. April 14, 1978); *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977, supp. opinion Jan. 28, 1978).

in view of the fact that tension relief advertisements had ceased about December 1973.

Thus, the penetration/image studies referred to above confirm what common sense and experience suggest, namely, that American Home's dissemination of the challenged advertising claims for a long period of time led to consumer images that Anacin is more effective than aspirin and that it relieves tension.

Next, respondents' sole-source argument is contrary to Commission precedent and should be rejected. The record as a whole clearly supports the inference that respondents' challenged advertising claims, made over a long period of time, played a substantial role in creating or reinforcing the misleading beliefs about Anacin among consumers.[119] Anacin has been advertised as a more effective pain reliever than aspirin and as a tension reliever. A substantial segment of consumers believe that Anacin is a more effective pain reliever than aspirin and is a tension reliever. This correspondence between advertising themes and consumer beliefs is a further indication that Anacin's advertising played a significant role in creating or reinforcing those beliefs.

With respect to the duration issue, the record as a whole supports the conclusion that the consumer beliefs about Anacin that have been found to exist will endure for some time and will tend to be reinforced either by subsequent advertising about Anacin or by subsequent use[120] (F. 579-84, 589–97 and 618). The duration of specific consumer beliefs and images generally depends on such factors as their importance to consumers, their specificity and the frequency with which they are reinforced by subsequent advertising or **[222]**by consumers' experience with Anacin that appear to them to be consistent with those beliefs (F. 584, 593 and 595–97). Clearly, efficacy is the *raison d'etre* of analgesics and is the most important product attribute for an analgesic product (F. 120). Tension relief is also an important attribute of an analgesic for a large segment of consumers of OTC analgesics (F. 495–500, 525–27 and 571). Respondents' expert, Dr. Smith, agreed that if a product is held in high esteem along the product dimensions that are important, it is likely that such beliefs will endure (Smith, Tr. 7776–77). The record evidence thus confirms what common sense and experience suggest, namely that product images about attributes important to consum-

[119] See *Warner-Lambert Co., supra*, 86 F.T.C. at 1501–02, 1503 (1975), 562 F.2d at 762; *Waltham Instrument Co.* 61 F.T.C. 1027, 1049 (1962), *aff'd*, 327 F.2d 427 (7th Cir. 1964), *cert. denied*, 377 U.S. 992 (1964).

[120] *Cf. Warner-Lambert Co., supra*, 86 F.T.C. at 1502–03, 562 F.2d at 762; *National Commission on Egg Nutrition* v. *FTC, supra.*

ers, once created, will endure for a long time and will tend to be reinforced by subsequent advertising or by subsequent use.[121]

B. *The Corrective Advertising Requirement*

The basic rationale of corrective advertising is that a misleading product image, once created, is likely to endure unless that image is unlearned by consumers through exposure to an appropriate corrective message for a sufficient time period. The Commission's Section 5 power to require corrective advertising in appropriate cases is not open to question. *Warner-Lambert Co., supra; National Commission on Egg Nutrition, supra.* Complaint counsel appear to argue that the finding that some of respondents' advertisements contained an implied establishment claim of superior efficacy for Anacin and the finding that some consumers believe that Anacin is more effective than aspirin *ipso facto* requires a corrective advertising requirement. I am of the view that the corrective advertising requirement is a discretionary remedy and that considerations of fundamental fairness and equity are relevant, although in all cases the elimination of mistaken consumer images is the paramount consideration.

In this case, although the finding of an implied establishment claim in certain advertisements is supported by the record and is a fair inference, I am not persuaded that the record supports an inference that consumers have an *establishment* image or that such an inference is fair in the circumstances of this case. In my view, to find an implied establishment claim in certain of respondents' **[223]** advertisements and to require in future advertisements containing such claims an affirmative disclosure of the material fact that a substantial question exists is one thing. To find an implied establishment claim, *which is not alleged to be false*, and to require corrective advertising in every future Anacin advertisement simply on the basis of consumer belief that Anacin is more effective than aspirin is another matter. The unfairness of the latter proposition is also compounded by the fact that complaint counsel's theory of liability, in this respect, is a novel one. Furthermore, if the finding of an establishment image among consumers is to be implied from consumers' image of Anacin's superior efficacy as a logical consequence of the implied establishment claim theory, the basis for doing so in this case is less than substantial since the evidentiary basis for finding a consumer belief that Anacin is superior than aspirin is itself less than overwhelming. Finally, as a practical matter, the aspirin disclosure requirement in the order will also have the further

[121] *Cf. Warner-Lambert Co., supra*, 86 F.T.C. at 1501–02.

effect of alerting consumers to the fact that the analgesic ingredient in Anacin is aspirin and may reasonably be expected to cause some consumers to modify their image of Anacin's superior efficacy to some extent. On balance, it is my determination that, on the basis of this record, corrective advertising directed to the superior efficacy image is not justified.

Corrective advertising directed to the tension relief image, however, stands on a different footing and is clearly required in my view. The tension relief claim was shown to be *false*. The evidentiary basis for the finding that American Home made that claim is solid as is the basis for concluding that consumers believe that Anacin is a tension reliever. Although the tension relief claim ceased by December 1973, it had been made for a long time. In view of the record evidence showing that consumers perceive tension relief as an important attribute of Anacin, it is reasonable to conclude that the tension relief image is likely to persist for some time to come in the absence of a corrective message. Therefore, it is my view that corrective advertising directed to the tension relief image is clearly justified.

The Liability Of Clyne, The Advertising Agency for APF

Complaint counsel and Clyne agree that an advertising agency may be held liable for false advertising if it actually participated in the deception and that it may be found to have participated in such deception if it knew or [224]had reason to know that the advertising was false. *Doherty, Clifford, Steers & Shenfield, Inc.*, v. *FTC*, 392 F.2d 921, 928 (6th Cir. 1968). Clyne was the advertising agency for APF since 1969 and does not deny that it participated generally in the preparation and dissemination of the APF advertisements containing the challenged claims. However, it vigorously contends that it did not know and had no reason to know that any of the challenged claims was false, that in fact it in good faith relied on the substantiation information furnished by American Home, and that under the law it had a right to do so. Complaint counsel agree that an advertising agency does not have the duty to conduct an independent scientific investigation or to retain medical scientists as expert consultants in order to insure that the medical-scientific claims contained in an advertisement are true or have been established. However, they argue that in this case Clyne knew or should have known that the substantiation material was patently inadequate and that, therefore, Clyne is equally liable. It is my determination that the record as a whole shows that: (1) Clyne either

knew or had reason to know that the uniqueness claim for APF was false; and (2) that Clyne's good faith reliance on the substantiation information obtained from American Home with respect to the comparative safety claim for APF was reasonable.

First, with respect to the uniqueness claim for APF (Comp. ¶8(B)(1)), there is no question that Clyne knew that the analgesic ingredient in APF is aspirin and that APF is essentially a buffered aspirin preparation. Therefore, the express and implied claims that APF's analgesic ingredient is unusual or special were patently false, and Clyne knew or should have known that they were false.

Second, with respect to the comparative safety claim for APF (Comp. ¶ 10(B)), the substantiation information furnished by American Home (CX 304) indicated that APF demonstrated less incidence of gastrointestinal irritation than buffered aspirin (CX 304S). Clyne should not be faulted for having equated "gastrointestinal irritation" with "stomach discomfort." Clyne had no reason to doubt the veracity or competency of American Home's medical-scientific research. Thus, it is reasonable to assume that Clyne relied in good faith upon this information. The key question is whether it was reasonable for Clyne to have relied on American Home with respect to the safety claim for APF. In my view, it was not unreasonable for Clyne to have done so. The Complaint does not allege that the claim is false; it merely alleges that the claim is not **[225]**established. This is not a case where the disparity between the advertising representations and the substantiation information is so great as to preclude a conclusion that the advertisements were conceived through reasonable reliance on the assurances of the manufacturer that the claim is true or has a reasonable basis. *Cf. Standard Oil Co. of California*, 84 F.T.C. 1401, 1474–75 (1974). Clyne cannot be reasonably charged with the duty to conduct an independent investigation that the claim is scientifically established in the sense that there existed two or more well-controlled clinical demonstrations in support of the claim. In these circumstances, Clyne's good faith reliance on American Home's assurances, as embodied in CX 304, was reasonable.

Relief

It is axiomatic that in Section 5 cases the Commission has the power and duty to fashion appropriate remedies which are reasonably calculated to prohibit the unlawful practices found to exist. *E.g.*, *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611–13 (1946); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC* v. *National Lead Co.*, 352 U.S. 419, 428–30 (1957). The remedy must have a reasonable relationship to

the unlawful practice and be no broader than is reasonably necessary to remedy the violation. *Jacob Siegel Co.* v. *FTC*, *supra*, at 613; *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 619–20 (3d Cir. 1976). See also *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 757–58 (D.C. Cir. 1977); *National Commission On Egg Nutrition* v. *FTC*, 570 F.2d 157, 164 (7th Cir. 1977).

A. *The Entry Of An Order Covering All Non-Prescription Drug Products Is Justified With Respect To American Home*

About a decade ago, the Commission had occasion to observe, in a case involving American Home, that:

> The law is clear that an order . . . need not be confined to the particular product or even the type of products sold by a respondent, particularly where the respondent has, by past conduct, demonstrated that the misrepresentations with which it has been charged are not isolated examples of its practices.[122] **[226]**

* * * * * * *

> In the field of drug advertisements it is particularly important that the Commission's orders be sufficiently broad to ensure that the public will be fully protected against any future misrepresentations made by respondents with respect to the entire line of proprietary preparations which it sells and that it not be limited to just one type of preparation.[123]

In that case, the Commission ordered respondents not to "misrepresent . . . the efficacy of [any] drug." Although the reviewing court disagreed that respondents' past conduct justified the broad order in that case,[124] it is my view that now is the time to place American Home under a broad proscription with respect to all OTC drug products marketed by it. Furthermore, the proscription here is narrower and is related to the particular type of unlawful practice found to exist in this case.

B. *The Reasonable Basis Provision Is Justified*

Part II B of the Order would prohibit simple and non-comparative efficacy or safety claims that are not supported by a reasonable basis. This prohibition is based on the finding that respondent for a long period of time claimed that Anacin was a tension reliever without a reasonable basis therefor. Although the tension relief claim ceased about December 1973, the provision is necessary in order to prevent in the future the renewal of that claim as well as any other simple

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[122] *American Home Products Corp.*, 70 F.T.C. 1524, 1625–26.

[123] *Id.* at 1627.

[124] *American Home Products Corp.* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968).

and non-comparative efficacy or safety claim concerning any non-prescription drug product not supported by a reasonable basis.

C. *The Requirements For Affirmative Disclosure Are Appropriate*

Part III A and B of the Order would require disclosure of the presence of aspirin in future advertisements for aspirin-containing products. Part III D would prohibit **[227]**advertising claims of comparative efficacy or safety unless such claims are established. However, Part III E would permit comparative efficacy or safety claims whenever they are qualified by a disclosure statement that there exists a substantial question regarding the claims.

Part III D's requirement for two or more "adequate and well-controlled" clinical investigations are based on the FDA regulation which sets forth similar criteria necessary to provide "substantial evidence" of efficacy for new drugs (21 CFR 331.111(a)(5)(ii) and 330.10(a)(4)(ii)), with certain modifications. The FDA regulation has been modified to reflect the facts that (1) this case involves comparative efficacy and safety, and (2) this case involves only OTC drug products. In this respect, I have adopted complaint counsel's proposed order provisions and hereby subscribe to the reasons explained in complaint counsel's Memorandum (CB, 183–88).

D. *The Corrective Advertising Provision*

The Order requires American Home to include in every Anacin advertisement a statement that "Anacin is not a tension reliever." The duration of the corrective advertisement to be required is a difficult question. However, I am persuaded that it is reasonable to adopt for the purposes of this case the one-year formula used by the Commision in the *Warner-Lambert* case, which met the reviewing court's approval. *Warner-Lambert Co.*, D. 8891, Modified Order To Cease And Desist, July 20, 1978. The average should be based on the period 1968 through 1973, when the tension relief claim ceased.

E. *The Provisions Directed To Clyne*

The provisions directed to Clyne are based on its liability for the false uniqueness claim with respect to APF, and will be confined to advertisements of OTC internal analgesic products. Complaint counsel have not shown that a broader product coverage with respect to Clyne is justified in view of its past Section 5 violations.

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the advertising of Anacin and Arthritis Pain Formula under Section 5 of the Federal Trade Commission Act. [228]

2. Respondents' use of false and misleading advertising representations as found herein has had and now has the capacity and tendency to mislead consumers into the mistaken belief that the said representations are true and into purchasing substantial quantities of Anacin and Arthritis Pain Formula by reason of said mistaken belief. In the absence of an appropriate order, consumers are likely to continue to purchase substantial quantities of said products in the mistaken belief that respondents' past advertising representations regarding the comparative efficacy of said products were supported by evidence generally accepted by the scientific community as establishing such propositions, and that the tension relieving representations regarding Anacin had adequate substantiation.

3. The acts and practices of respondents as found herein were and are prejudicial and injurious to the public and constitute unfair methods of competition and unfair and deceptive acts in commerce in violation of Section 5 of the Federal Trade Commission Act.

4. The Complaint is hereby dismissed as to all respondents insofar as it relates to the advertising representations that Arthritis Pain Formula will eliminate all pain, stiffness and discomfort usually experienced by arthritis sufferers in the morning (Comp. 8(B)(2)). The complaint is dismissed as to the C.T. Clyne Company, Inc. except as relates to the advertising representations that Arthritis Pain Formula's analgesic ingredient is unusual and special (Comp. 8(B)(1) in part).

5. The accompanying order is necessary and proper for the purpose of prohibiting the continuation of the proscribed acts and remedying the injury and unfairness to the consuming public.

Order

I

It is ordered, That respondent American Home Products Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or [229]other device, in connection with the labeling, advertising, offering for sale, sale or distribution of "Anacin," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist

from representing, directly or by implication, that Anacin relieves nervousness, tension, anxiety or depression or will enable persons to cope with the ordinary stresses of everyday life.

II

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That such product contains more of any ingredient than any other non-prescription internal analgesic product or products, or otherwise making a quantitative comparison with any other product or products, unless: **[230]**

a. The ingredient is named by its common, or usual, name;
b. The product, or products, used for comparison is, or are, named;
c. The ingredient is present in greater amount in such preparation than in the product, or products, used for comparison;

and unless each advertisement containing such representation also contains a clear and conspicuous disclosure stating that the comparative efficacy or safety claim "has not been scientifically proven." Such disclosure statement shall be further subject to the requirements of IV A 1 and 2 of this Order.

2. That such product contains any ingredient, or combination of ingredients, which is unusual, special or exclusive when such ingredient, or combination of ingredients, is available in other non-prescription internal analgesic products.

3. That such product will relieve headache pain in any period or amount of time; *provided, however,* that it shall be a defense in any enforcement proceeding instituted under this prohibition **[231]**for respondent affirmatively to establish that there is a reasonable probability that a great majority of consumers will obtain relief from headache pain within such period or amount of time.

B. Making any simple and non-comparative representations, directly or by implication, concerning the effectiveness or safety of such product unless, at the time such representation is made, respondent has a reasonable basis for such representation which shall consist of competent and reliable scientific evidence.

III

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula" or any other non-prescription drug product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Referring, directly or by implication, to aspirin, or to any commonly known ingredient, by any word or words without disclosing the common, or usual, name of such ingredient. [232]

B. Failing to disclose in the advertising of such product the presence of aspirin when such product contains such ingredient.

C. Misrepresenting, in any manner, any test, study or survey or any or all of the results thereof.

D. Representing, directly or by implication, that a claim concerning the comparative effectiveness or comparative freedom from side effects of such product has been established unless such representation has been established by two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the effectiveness and comparative effectiveness or comparative safety of the drugs involved, on the basis of which it could fairly and responsibly be concluded by such experts (1) that the drug will have the comparative effectiveness or safety that it is represented to have, and (2) that such comparative effectiveness or safety is demonstrated by methods of statistical analysis, and with levels of confidence, that are generally recognized by such experts. At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be [233]conducted on any disease or condition referred to, directly or by implication; or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is effective. To provide the

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basis for the determination whether any clinical investigation is "adequate and well-controlled," the plan or protocol for the investigation and the report of the results shall include the following:

1. A clear statement of the objective of the investigation.
2. A method of selection of the subjects that:

a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any);

b. Assigns the subjects to the test groups in such a way as to minimize bias; and

c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity, or duration of disease or condition (if any), and use of drugs other than the test drugs.

3. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment [234]of any subject's response and steps taken to minimize bias on the part of the subject and observer.

4. A comparison of the results of treatments or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data. The investigation must be conducted double-blind, and methods of double blinding must be documented. In addition, the investigation shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.

5. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

E. D. hereinabove shall not be construed to prohibit respondent from making any representation, directly or by implication, concerning the comparative efficacy or safety of such product when such representation or claim is not established by two or more well-controlled clinical investigations as specified in D. hereinabove, [235] provided each advertisement containing such representation also contains a clear and conspicuous disclosure stating that the comparative efficacy or safety claim "has not been proven." Such disclosure statement shall be further subject to the requirements of IV A 1 and 2 of this Order.

IV

A. *It is further ordered*, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Anacin unless it is clearly and conspicuously stated in each such advertisement that "Anacin is not a tension reliever."

1. In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed.

2. In television advertisements, the disclosure shall be presented simultaneously in both the audio and video portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall **[236]**occur. Each such disclosure shall be presented in the language, *e.g.*, English, Spanish, principally employed in the advertisement.

B. The aforesaid duty to disclose as provided in Paragraph IV A shall continue until respondent has expended on Anacin advertising a sum equal to the average annual Anacin advertising budget for the period of April 1968 to April 1973.

V

It is further ordered, That respondent the C.T. Clyne Company, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of "Arthritis Pain Formula" or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product contains any ingredient or combination of ingredients which is unusual or special when such ingredient or combination of ingredients is available in other non-prescription analgesic product or products.

VI

It is further ordered, That respondents American Home Products

Corporation and the C.T. Clyne Company, Inc. shall notify the Commission at least thirty (30) days prior to any [237]proposed change in their respective corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in their respective corporation which may affect compliance obligations under this Order.

VII

It is further ordered, That the respondents herein shall within sixty (60) days after service of this Order upon them, file with the Commission a written report setting forth in detail the manner and form in which they have complied or intend to comply with this Order.

Paragraph Eight B 2 of the Complaint is hereby dismissed as against American Home Product Corporation. The Complaint is dismissed as against the C.T. Clyne Company, Inc. except with respect to Paragraph Eight B 1 and related allegations.

Appendix I

A Description Of The Methodology Of The Image And Penetration Studies In Evidence

CX 451 – *A Study In-Depth Of Heavy Users Of Analgesics For Headache Relief*

Client: Whitehall Laboratories, division of American Home.

Purpose: To study consumer attitudes toward, and images[1] of analgesics with emphasis placed on the leading brands—Anacin, Bayer, Bufferin and Excedrin; to examine brand switching patterns; to aid in developing marketing strategies for the products involved (Weinberger, Tr. 683–84, 686; CX 451D–E).

Date of Study: Interviewing took place during the month of May 1967 (CX 451Z086).

Background of Researchers: The study was conducted by Oxtoby-

[1] See F. 486, *supra*, for the meaning attributed to the term, "consumer image," in this proceeding.

Smith, a consumer and market research organization, with Mr. Martin Weinberger bearing primary responsibility for the project (Weinberger, Tr. 682–83). Mr. Weinberger has had ample experience in the area of consumer research (Weinberger, Tr. 680–81).

Mr. Weinberger designed the research and the questionnaire, prepared the tabulation plan, analyzed the data and drafted the report (Weinberger, Tr. 684, 686, 702–03). Oxtoby–Smith's field director prepared written instructions for the interview supervisors (Weinberger, Tr. 689; CX 452Z090–Z092). These supervisors, who did not work exclusively for Oxtoby-Smith, often had been utilized in previous field work done for the firm; the supervisors selected the interviewers (Weinberger, Tr. 693).

In-house coding and keypunching allowed for close supervision by Oxtoby-Smith (Weinberger, Tr. 684, 697–98, 699). The tabulation of the data was done by an outside computer firm. CX 1058 contains the tabulations for this study (Weinberger, Tr. 701).

Methodology: The questionnaire was pretested (Weinberger, Tr. 687).

Interviews were conducted in 21 cities selected for geographic dispersion and intended to be representative of the national distribution of city populations (CX 451Z085; CX 452Z088). The study was conducted among 1,509 respondents, divided equally by sex (CX 451Z084). Quotas were set for the following groups: [2]

(1) Heavy users, defined as those who took six or more pain relievers for headache in the two-week period prior to the interview and representing users of each of the four leading brands (Anacin, Bayer, Bufferin and Excedrin) as well as a group to represent users of non-leading brands. Excluded from this heavy user group were those who took pills for problems other than headache; took more pills for arthritis than for headache; or use an effervescent tablet as their regular brand.

(2) Light users, defined as those who took at least one pain reliever for headache in the month preceding the interview.

(CX 451Z084; Weinberger, Tr. 687–89).

Interviews were conducted on a door-to-door basis (CX 451Z086; CX 452Z087) during days, evenings and Saturdays so as to find working persons and persons of both sexes at home (CX 452Z090). Interview supervisors developed routes that were assigned to the interviewers. If the appropriate person in a household were not available, the interviewer was instructed to proceed to the next household. Call-backs (in the event no one was home) were not

made (Weinberger, Tr. 695). Thus, the sample selection was not shown to have been based on principles of accepted statistical sampling that assure representativeness and projectability of the sample.

There is no indication of the interview refusal rate.

Interviewers utilized a written questionnaire, with detailed instructions, on which they recorded the responses of those interviewed (CX 452Z090–Z108).

The interview supervisors validated, by telephone, 15% of the interviews completed in their area. Oxtoby-Smith also validated 15% of the completed interviews, with 5% overlapping the 15% that had been validated by the interview supervisors. If validation revealed that an interview was not conducted, then all of that interviewer's work would be validated and possibly thrown out (Weinberger, Tr. 696–97; CX 451Z086). [3]

CX 452 – *A Follow-Up Study Of Attitudes Toward Headaches And Analgesics Among Heavy Users Of Leading Brands*

CX 452 was designed as a follow-up study to CX 451 and was developed to explore whether there had been significant shifts in public sentiment toward the leading analgesic products (CX 452D–E). The description and statement of methodology provided for CX 451 (Appendix I, pp. 1–2) are applicable to this study as well and are incorporated herein unless otherwise stated.

Date of Study: Interviewing took place during the week starting July 6, 1970 (CX 452Z088).

CX 1059 contains the tabulations for this study (Weinberger, Tr. 701).

Methodology: The study was conducted among 759 respondents, divided equally by sex (CX 452Z087–Z088).

In addition to the four leading brands included in CX 451 (Anacin, Bayer, Bufferin and Excedrin), users of Alka-Seltzer were also included in this study (CX 452Z087–Z088). The results for light users were tabulated for this study as well as for CX 451 (Weinberger, Tr. 691–92).

Approximately three-fourths of the items in each individual question in CX 451 were repeated in CX 452 (Weinberger, Tr. 706).

CX 453 – *Headache Remedy/Pain Reliever Product Usage And Advertising Penetration*

Client: Whitehall Laboratories division of American Home.

Purpose: To ascertain current advertising penetration[2] levels of Anacin, Bayer, Bufferin, Excedrin and Tylenol (CX 453C).

Date of Study: Interviewing was done between March 19 and April 9, 1973 (CX 453D).

Background of Researchers: The study was conducted by Sobel-Chaikin Research Associates, an independent market research organization, in cooperation with American Home [4](CX 453D). Mr. Charles Sobel had primary responsibility for the study (Sobel, JTr. 462). Mr. Sobel has had extensive experience in the design and execution of consumer research, with almost all of his work involving advertising penetration (Sobel, JTr. 448–53, 455).

Sobel-Chaikin selected the interview supervisors based on prior experience; the supervisors selected the actual interviewers. Both supervisors and interviewers were given detailed instructions (Sobel, JTr. 472).

In-house coding (Sobel, JTr. 483–85) and in-house data processing (Sobel, JTr. 485–86) allowed for supervision by Sobel-Chaikin.

Methodology: There was no pretesting of the questionnaire, but the questions had been used before (Sobel, JTr. 464).

The survey covered 10 market cities (Sobel, JTr. 465; CX 453C).

The 500-person sample, evenly divided by sex (Sobel, JTr. 465–66), is not statistically projectable (Sobel, JTr. 557–58). The survey population was randomly selected from listed telephone numbers (Sobel, JTr. 466–69).

Interviewers recorded responses from the phone interviews on call record sheets; no call-backs were made (Sobel, JTr. 469–70). The interview refusal rate was not tabulated.

The survey was limited to users of headache remedies or pain relievers who had taken such medications in the 30 days prior to the interview (Sobel, JTr. 474).

The survey only reports responses that were given by more than eight respondents (Sobel, JTr. 524–27).

Respondents were asked about their recall of brands on an unaided basis first and, then, on an aided basis (Sobel, JTr. 505).

Interview supervisors performed some of the validation and revalidation of the interviews; Sobel-Chaikin contracted with an outside research firm for 10 to 15% of the revalidation (Sobel, JTr. 477–81). This process served to reduce bias since the outside firm had

[2] See F. 488, *supra*, for the meaning attributed to the term, "advertising penetration," in this proceeding.

no interest in whether or not the interviews were properly conducted. [5]

CX 454 – *Assets And Liabilities Study Of Adult Analgesics*

Client: Glenbrook Laboratories, division of Sterling Drug.

Purpose: To provide assets and liabilities profiles for Bayer Aspirin and other leading analgesic products in the context of consumers' images of the products (CX 454C).

Date of Study: Interviewing took place during the first half of July 1967 (CX 454E).

Background of Researchers: The study was conducted by the research department of Dancer-Fitzgerald-Sample, Inc., an advertising and market research organization, with Mr. Lloyd C. Miller in charge (Miller, JTr. 209–10). Mr. Miller was responsible for the design and analysis of the study. The field work was subcontracted out to Crossley Surveys, an organization that designs and conducts surveys on consumer products, with Mr. Franklin B. Leonard in charge (Leonard, JTr. 83, 85–87). Mr. Leonard was responsible for selecting the sample, conducting the interviews and coding the results (Leonard, JTr. 89, 119–20). Both Mr. Leonard and Mr. Miller have extensive experience in consumer market research (Leonard, JTr. 83–86; Miller, JTr. 206–09).

The interview supervisors were carefully chosen by Crossley. They were constantly monitored, trained and provided with detailed instructions. The interviewers, selected by Crossley as well as by the supervisors, were also carefully trained and instructed (Leonard, JTr. 105–13). Crossley did the editing and coding, while the tabulations were farmed out to another organization (Leonard, JTr. 118).

Methodology: The questionnaire was not pretested inasmuch as many of questions, as well as the technique utilized, were taken from a 1963 study (Leonard, JTr. 94–95).

Personal in-home interviews were conducted of 605 analgesic users, geographically and economically dispersed throughout the country. A sex quota of an even distribution of males and females was imposed (CX 454E, Z156–Z157). The selection of the sample, termed a multistage stratified area sample, was done in several steps. It involved going from 35 primary sampling units to minor civil divisions, to blocks, to households and, finally, to one individual within a household. This systematic selection of the sample, intended

to be representative of the U.S. population in terms of 4 geographic regions and in terms of 3 sizes of standard metropolitan statistical areas and one size of all nonmetropolitan areas, resulted in about 15 to 20 interviews per sampling unit (Leonard, JTr. 95–99). The interviewers were instructed to proceed from a random starting point and travel in a specified direction; such instructions [6]were provided by Crossley, and removed as much discretion from the interviewers as possible (Leonard, JTr. 99–100). The sample, however, was not a straight probability sample and the results are not statistically projectable to the entire country (Leonard, JTr. 127–28; Miller, JTr. 261).

Call-backs were not made. The interval refusal rate was not tabulated (Leonard, JTr. 114; Miller, JTr. 260).

After a respondent was qualified as an analgesics user, a questionnaire and booklet technique was utilized to elicit the respondent's image of seven brands of analgesics (Leonard, JTr. 89–90; CX 454F). The respondents were given a notebook of 31 pages, each page containing a positive statement relating to an attribute associated with analgesics at the top and a negative statement at the bottom; they were asked to place a card for each of the seven brands into one of six pockets running from top to bottom and, thereby, to express an attitude about each brand for each attribute (Leonard, JTr. 90, 91; Miller, JTr. 215–16; CX 454D, Z155). There was an absence of a precise differentiation between the middle ranges of the six-point rating scale; whether such a middle rating indicated one or another meaning or no meaning at all could not be ascertained (Leonard, JTr. 139–41). Only the top and the two bottom gradations on the rating scale were used in the analysis with the other three ignored (Miller, JTr. 243–47, CX 454Z155). Persons who gave the same rating to all brands were classified as non-discriminators and were reported separately in the tabulations (CX 454Z155–Z156). Once the notebook part of the survey was completed, several questions relating to usage and awareness of analgesic brands were asked (CX 454D). The interviewers were required to carefully transfer the results of each interview from the notebook to a recording sheet (CX 454Z155; Leonard, JTr. 131–32).

Validation was done by the interview supervisors. Crossley also validated about 15% of the interviews, and Dancer-Fitzgerald-Sample validated an additional 10% on top of that (Leonard, JTr. 109, 115; Miller, JTr. 229–30).

CX 455 and 456 – *A Study of Vanquish's Market Opportunities*

Client: Glenbrook Laboratories, division of Sterling Drug (Pernica, JTr. 1893).

Purpose: To provide a market segmentation study, which divided consumers into groups based upon their motivations and needs with regard to analgesics; to assess the performance of Vanquish and to evaluate how it fitted into the analgesics market from a motivational perspective at the date of the study (Fishman, JTr. 1288; Pernica, JTr. 1891–92; CX 455E). [7]

Date of Study: November 1970 (CX 455B).

Background of Researchers: The study was conducted by Benton and Bowles, an advertising agency, with Mr. Joseph Pernica in charge (Pernica, JTr. 1891). Mr. Pernica was responsible for developing the methodology, study design, questionnaire, overseeing the execution of the study and reporting the results (Pernica, JTr. 1893, 1933–34). The field work was subcontracted to Lieberman Research, West, with Mr. Arnold Fishman, president of the firm, in charge (Fishman, JTr. 1281; Pernica, JTr. 1891). Mr. Fishman was responsible for carrying out the interviewing, coding and tabulations (Pernica, JTr. 1896). Both Mr. Fishman and Mr. Pernica have extensive experience in the area of consumer market research (Fishman, JTr. 1284–85; Pernica, JTr. 1887–90).

Area supervisors were selected by Mr. Fishman on the basis of past performance. The supervisors selected the interviewers. The supervisors and interviewers were provided with written instructions (Fishman, JTr. 1301–03).

Mr. Fishman's firm did the coding (Fishman, JTr. 1320–21), with Mr. Pernica involved in the approval of the codes used (Pernica, JTr. 1929). Mr. Fishman subcontracted out the keypunching and tabulations to Dataprobe (Fishman, JTr. 1321; Pernica, JTr. 1929–30).

Methodology: The questionnaire was pretested (Fishman, JTr. 1296; Pernica, JTr. 1898).

Personal in-home interviews of 827 analgesics users formed the basic sample, with an additional supplementary sample of 186 Vanquish users interviewed (CX 455F). Those respondents selected for the basic sample were from cities in "heavy-up advertising regions" of the Mid-Atlantic and West Coast; these were regions where the greatest amount of advertising dollars for Vanquish had been spent (CX 455F; Pernica, JTr. 1988–89). The basic sample was subject to a quota of 50% males/50% females. The supplementary sample came from high Vanquish share cities and was not subject to

a sex quota (CX 455F). The basic sample came from eight cities, with the intention of obtaining 100 respondents from each of the markets (Fishman, JTr. 1336, 1392; CX 455F). No weighting factors were used despite the fact that the same number of respondents was selected from cities of disparate populations (Fishman, JTr. 1397–99; Pernica, JTr. 1989).

The respondents had to be 18 years old or older (CX 455F). The sample was selected randomly. Telephone directories were used to generate initial street addresses; interviewers were instructed to go to the house next to that address and then around the block in sequence so as to control for unlisted telephone numbers (Fishman, JTr. 1298–1300; Pernica, JTr. 1926). [8]

Call-backs were not made in the event a suitable respondent were not at home (Fishman, JTr. 1392). The interview refusal rate was not tabulated.

The order of the brands was rotated in the questionnaire so as to reduce any bias that might be due to the order of presentation (Pernica, JTr. 1898).

The interviews were about 45 minutes in length (Fishman, JTr. 1294).

A six-point rating scale containing no neutral step was utilized. The sum of the two top ratings was reported so as to compress the data; the other four ratings were ignored (Pernica, JTr. 1915–18).

Validation of about 15% of the interviews was done by an outside validation service (Fishman, JTr. 1316–18, 1326).

The study contains a narrowly drawn sample and is not a national probability sample (Fishman, JTr. 1338; Pernica, JTr. 1926). Therefore, it is not statistically projectable to the entire nation (Fishman, JTr. 1357).

CX 457 – *Public Beliefs About Selected Analgesic Products*

Client: Federal Trade Commission (Leavitt, Tr. 1267; Crespi, JTr. 2267–68).

Purpose: To determine whether Anacin, Bufferin and Excedrin are each rated higher than aspirin on four attributes—effectiveness, speed, strength and gentleness (CX 457B and W; Leavitt, Tr. 1278). The study was conducted with the fore-knowledge that it would be used in litigation (Leavitt, Tr. 1270; Crespi, JTr. 2456).

Date of Study: Interviewing was conducted from December 5–10, 1975 (CX 457Q').

Background of Researchers: Dr. Clark Leavitt developed the

questionnaire and performed the analysis (Crespi, JTr. 2268). Dr. Leavitt also decided on the criteria that would be utilized in the field work (Leavitt, Tr. 1276–77). Dr. Irving Crespi, of the Gallup organization, had responsibility for the field work which consisted of conducting, recording, tabulating and coding the interviews as well as punching the results on computer cards and checking for internal consistency (Leavitt, Tr. 1290; Crespi, JTr. 2268). The sample was drawn by Gallup (Leavitt, Tr. 1288). Both Drs. Leavitt and Crespi have excellent academic [9]credentials and extensive experience in the design and execution of research surveys (Leavitt, Tr. 1245–55; Crespi, JTr. 2261–67; CX 507A–K; CX 508A–B). Dr. Leavitt was responsible for writing the report (Leavitt, Tr. 1315; CX 457).

The interviewers were regularly employed by Gallup and were given in-house training; they were provided with written instructions (Crespi, JTr. 2288–90).

The coding and keypunching were done by Gallup personnel (Crespi, JTr. 2296–2300).

Methodology: The questionnaire went through evaluation and pretesting stages by Gallup (Leavitt, Tr. 1287; Crespi, JTr. 2269–73).

Telephone interviews, approximately 10 minutes in length each, were completed for 786 persons (Crespi, JTr. 2277, 2296). Data from 780 interviews were sent to Dr. Leavitt (Crespi, JTr. 2387–88). Dr. Leavitt eliminated 17 interviews, leaving 763, because those 17 persons had not heard of one or more of the four brands (Leavitt, Tr. 1299; CX 457D).

The sample was drawn in two stages: first, utilizing current Census Bureau information and random mathematical selection procedures, a systematic sample from a random starting point with a probability of selection proportional to size was generated (Crespi, JTr. 2285–88; CX 457R–S); second, from telephone numbers arrived at in the first stage, and used as starting points, randomly selected digits were added onto the last digit of the telephone number in order to insure a representative proportion of residential listings as well as unlisted numbers (Crespi, JTr. 2282–85; CX 457Q').

The population surveyed was intended to be a national probability sample, representative of residential telephone numbers and projectable to persons 18 years of age or over with telephones (Leavitt, Tr. 1289; Crespi, JTr. 2288; CX 457D, Q').

If no one were at home, one call-back was made (Crespi, JTr. 2293). The interview refusal rate was 21.3%. From the initial sample of 2,020 telephone numbers, there were 445 invalid numbers, leaving 1,575. The interview completion rate was 49.9% (Crespi, JTr. 2294–

96; CX 1053). The interviews were conducted on weekday evenings and on the weekend in order to pick up working people (CX 457Q').

The order of the presentation of the four products (Anacin, Bufferin, Excedrin and Aspirin) was rotated so as to reduce position bias (Crespi, JTr. 2274, 2276; CX 457H). **[10]**

A four-point rating scale, with three positive steps ("extremely," "very" and "fairly") and one negative step ("not"), was used (CX 457D–F). Absolute, rather than comparative, questions were asked (CX 457F–G). There was no pretest regarding the validity of the assumption that the four attributes—effectiveness, speed, strength and gentleness—were important to consumers (Leavitt, Tr. 1333–34, 1337–40).

Approximately 8% of the interviews were validated by the interview supervisors (Crespi, JTr. 2293–94).

CX 462 – *The 1969 Excedrin Study*

Client: Bristol-Myers.

Purpose: To study primary and secondary users of Excedrin, brand image, brand switching, occasions for usage, awareness and advertising penetration, all within the context of Excedrin compared to other analgesics (Rosenbluth, JTr. 2863–64; Randall, JTr. 2986; CX 462J–L).

Date of Study: The field work was conducted from June 6, 1969 through July 20, 1969 (CX 462L).

Background of Researchers: The study was conducted by the research department of Young and Rubicam, an advertising agency, with Mr. Leon Rosenbluth in charge (Rosenbluth, JTr. 2856, 2864). Mr. Rosenbluth engaged Mr. Stanley Randall to analyze the data and write the report (Rosenbluth, JTr. 2870–71; Randall, JTr. 2981). Mr. Randall was the principal author (Randall, JTr. 2983). Grudin Appel, a market research firm, was chosen to conduct the interviews, draw the sample, and do the coding and tabulating (Rosenbluth, JTr. 2865, 2868; Nudorf, JTr. 2901); Mr. H. William Nudorf was in charge (Nudorf, JTr. 2900, 2902). Each of these individuals, and their respective companies, has extensive experience in the consumer market research field (Rosenbluth, JTr. 2855–62, 2868, 2871–73; Nudorf, JTr. 2900–01; Randall, JTr. 2978–80).

Mr. Nudorf personally selected the interview supervisors on the basis of experience. The supervisors selected the interviewers (Nudorf, JTr. 2946–47). Detailed written instructions were provided for the interviewers (Nudorf, JTr. 2906–07, 2913, 2922–31).

Grudin Appel did the coding (Nudorf, JTr. 2951). They subcontracted the tabulation to Donovan Data, a well-qualified data processing firm (Rosenbluth, JTr. 2868–69; Nudorf, JTr. 2952). [11]

Methodology: The questionnaire was put through limited pretesting to assure its utility for field work (Nudorf, JTr. 2909).

Personal, in-home interviews of 1,045 male and female analgesic users, 18 years of age or older, were conducted (CX 462L). The sample was arrived at through the use of Census Bureau information, telephone directories to generate initial addresses and mathematical and random selection of households to be interviewed (Nudorf, JTr. 2932–44, 2963–65). The study was conducted in Nielsen A and B counties which were where Excedrin had its highest market shares; these are urbanized, major metropolitan areas and make up about 66% of the country (Nudorf, JTr. 2932; Randall, JTr. 2986). Sixty geographically dispersed sampling points were used (CX 462L). In order to obtain a sufficient base of Excedrin primary and secondary users for analysis, other analgesic users were intentionally undersampled. Subsequently, the sample was statistically weighted so as to represent the population of A and B counties, yielding a total weighted sample of 1926 interviews (Randall, JTr. 2987–89; CX 462L). The resultant sample of 1926 respondents is projectable to A and B counties (that is, to urbanized metropolitan areas) (Nudorf, JTr. 2944–45; Randall, JTr. 2988, 3024, 3026–27).

Each interview ran about 50 minutes (Nudorf, JTr. 2931). The responses were recorded by the interviewers on worksheets that allowed for validation as to whether the interviewer was following the prescribed sampling procedure (Nudorf, JTr. 2943). Anyone in a household, 18 years of age or older, qualified as a respondent (Nudorf, JTr. 2966). Interviewers worked evenings and on weekends so as to pick up working people (Nudorf, JTr. 2967). There was provision for call-backs in the event no one was at home (Randall, JTr. 2987). The interview refusal rate was not tabulated.

The four brands—Anacin, Bayer, Bufferin and Excedrin—had their order of presentation rotated so as to reduce position bias (Nudorf, JTr. 2928–29).

The interview supervisors validated a portion of the interviews (Nudorf, JTr. 2948–49). Grudin Appel checked the sampling points against maps. If a discrepancy arose, then 5–20% of that interviewer's work was validated (Nudorf, JTr. 2949–50). Mr. Randall spot-checked some questionnaires, coding and tabulations (Randall, JTr. 2991–93); he excluded any data that he felt was unreliable (Randall, JTr. 2996–97). [12]

CX 467 – *Consumer Use of Headache Remedies And Knowledge Of Their Ingredients*

Client: Bristol-Myers.

Purpose: As stated in title, for Anacin, Bayer and Bufferin (CX 467C).

Date of Study: Interviewing was conducted in May 1964 (CX 467D).

Background of Researchers: The study was conducted by the Gallup Organization, with Dr. Irving Crespi in charge (Crespi, JTr. 2314, 2316–20). Dr. Crespi has excellent academic credentials and extensive experience in the design and execution of research surveys (Crespi, JTr. 2261–67; CX 508A–B).

The interviewers were regularly employed and directly supervised by Gallup; they were provided with written instructions (Crespi, JTr. 2327–29).

The coding and keypunching were done by Gallup; checking and verification were done by Gallup supervisors (Crespi, JTr. 2296–2300, 2330). The tabulation of the data was done by an outside computer service (Crespi, JTr. 2331–32).

Methodology: The questionnaire was pretested (Crespi, JTr. 2324).

Personal interviews of 1607 persons were conducted (Crespi, JTr. 2327; CX 467D). Allowance for persons not at home was made by incorporating a "times-at-home" weighting to all results, rather than by call-backs (CX 467R). The interview refusal rate was not tabulated.

The interviewers recorded respondents' answers in check boxes for closed-ended questions (Crespi, JTr. 2329). Five questions out of nine were open-ended, requiring the interviewers to record verbatim answers (CX 467C–D; Crespi, JTr. 2329–30).

Twenty to thirty percent of the interviews were validated by sending postcards to respondents (Crespi, JTr. 2330–31).

The order of questioning about each of the brands was rotated to control for any bias that might be due to the order of presentation (CX 467C–D).

The sample was intended to be a national probability sample down to the block level in urban areas and down to segments of townships in rural areas. Based upon Census Bureau data and random mathematical selection procedures, 150 different sampling areas were selected—technically, this is known as a systematic sample from a random starting point with probability proportional [13]to size. This sampling procedure should produce a sample representa-

tive of the adult population, 21 years of age or older, living in private households in the United States. The sample is designed to be statistically projectable to that portion of the total population (Crespi, JTr. 2326–27, 2285–88; CX 467S).

CX 468 – *Pain Reliever Telephone Study*

Client: Bristol-Myers.

Purpose: Unstated; presumably, to assess usage of and awareness of ingredients in non-prescription analgesics, focusing on users of Bufferin and Excedrin (*See* questionnaire at CX 468Z019–Z021).

Date of Study: Interviewing was conducted during the week of July 10, 1972 (CX 468C).

Background of Researchers: The study was conducted by Edward Blank Research, Inc., a market research firm (Blank, JTr. 2657–58, 2664). Mr. Edward Blank, president of the firm (Blank, JTr. 2657), has had ample experience in conducting market research surveys (Blank, JTr. 2658–63).

The field work was conducted by local interviewers who were selected by interview supervisors. The supervisors were chosen by Mr. Blank on the basis of past performance or recommendations (Blank, JTr. 2670). Both the supervisors and interviewers were provided with rudimentary written instructions (Blank, JTr. 2671–73. *See* also questionnaire at CX 468Z019–021).

Mr. Blank's firm did the coding (Blank, JTr. 2676–77). The processing and tabulations of the data were subcontracted out to Datatab. Datatab checked the coding for errors (Blank, JTr. 2678–80).

There was no analysis done of the data in CX 468 (Blank, JTr. 2681).

Methodology: The questionnaire was not pretested (Blank, JTr. 2668).

The interviews were conducted by telephone (Blank, JTr. 2666). No call-backs were made if a suitable respondent were not home. The interview completion rate was not tabulated (Blank, JTr. 2673).

The sample size was 500 interviews, 100 in each of five markets (New York, Atlanta, Chicago, Denver and San Francisco), with a quota of 40% males/60% females, regardless of their use of analgesics. 499 interviews were completed (Blank, JTr. 2665; CX 468C). The sample was systematically selected in a random [14] fashion from telephone directories (Blank, JTr. 2668–70); only listed

telephone numbers were called (Blank, JTr. 2689). The respondents had to be 18 years of age or older (Blank, JTr. 2673). The survey population is not statistically projectable to the entire country nor, in the case of the New York market, is it projectable to that entire city (Blank, JTr. 2685–86).

The interviewers and supervisors were responsible for selecting the sample (Blank, JTr. 2671–73).

There was rotation of the order of the brands in the questionnaire so as to reduce position bias (Blank, JTr. 2667).

Validation of approximately 15% of the interviews was done by an independent Watts company. Validation was done by telephone and was limited to verifying that an interview had taken place (Blank, JTr. 2674–76).

CX 477 – *Advertising Penetration Study*

Client: Bristol-Myers.

Purpose: To assess the penetration of two ideas in the "Glass Men" advertising campaign (for Bufferin)—"faster to your headache" and "gentler to your stomach" (Weitz, JTr. 911; CX 477C).

Date of Study: Interviewing was conducted in April 1971 (CX 477C).

Background of Researchers: The study was conducted by the research department of Ted Bates and Co., utilizing the services of Valley Forge Information Services ("Valley Forge"). Both Mr. Kenneth Frato, for Valley Forge, and Ms. Anne Weitz, for Ted Bates, have had extensive experience in working with consumer surveys (Frato, JTr. 717–18; Weitz, JTr. 807, 810).

The interviewers were employees of Valley Forge, thereby assuring a degree of control and supervision over the manner in which the interviews were conducted (Frato, JTr. 723). The coding and tabulation were done by Ted Bates (Weitz, JTr. 823, 826; CX 477C).

Methodology: The questionnaire was pretested (Frato, JTr. 727).

The interviews took place over the telephone (Frato, JTr. 721). As each telephone interview was taking place it could be monitored by a supervisor (Frato, JTr. 742), thereby eliminating the need for validation (Frato, JTr. 746). **[15]**

The interviewers recorded responses on call record sheets (Frato, JTr. 753). There was provision for up to two call-backs to be made (Frato, JTr. 744). The interview refusal rate was not tabulated.

Where respondents gave general answers to a question, the

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interviewer would follow-up with questions of a probing nature which tended to elicit responses (Frato, JTr. 729–31).

The survey population was intended to represent a national probability sample. Telephone numbers were randomly selected on a systematic basis from United States phone books; there were 100 sampling points across the country (Frato, JTr. 736–39, 750, 753–54; CX 477Z004). The sample was 70% female, 30% male, according to the assigned quota (Weitz, JTr. 887–89). The respondents had to be 18 years of age or older (CX 477Z004). The sample consisted of 1,004 individuals, but 125 West Coast residents were excluded (resulting in a sample of 879) because that part of the country was a test area for Bufferin and Excedrin (CX 477C). Thus, the projectability of the survey was limited to persons over 18 years of age, with listed telephone numbers, who did not reside on the West Coast (Frato, JTr. 755; Weitz, JTr. 931–32).

Opinion of the Commission

By Pertschuk, *Commissioner:*

Aspirin: homey, familiar, time-tested aspirin has long been an honored staple in the American family's arsenal against common maladies. So homey is this ingredient that it evokes no aura of mystery or magic, though indeed its therapeutic properties are significant; so familiar that the firm that pioneered its development was stripped of its trademark in private litigation 60 years ago;[1] so commonplace that a maker of one aspirin-based pain reliever seeking to differentiate its product from the rest faces a formidable marketing task. What better way to meet this challenge than to establish a new identity for the product, dissociated from ordinary aspirin, and then to represent it as special and more effective than its competitors? That effort may solve the marketer's marketing problem—but if the representations of specialness and superiority are not adequately supported, they can be, simply put, deceptive. That is the heart of the case before us.

At issue is the lawfulness of advertising claims made for Anacin and Arthritis Pain Formula (APF), two over-the-counter (nonprescription, or "OTC") aspirin-based analgesic (pain relief) products.[2] The Commission's complaint, issued on February 23, 1973 [2]against American Home Products Corporation (AHP) and Clyne Maxon, Inc. (Clyne), AHP's advertising agency for APF, charged that the respondents had violated Sections 5 and 12 of the Federal Trade

[1] *Bayer Co.* v. *United Drug Co.*, 272 F. 505 (S.D.N.Y. 1921).

[2] Anacin's active ingredients are aspirin and caffeine; APF's are aspirin and two antacids. See *infra*, p. 5.

Commission Act (15 U.S.C. 45, 52) in making certain advertising claims as to the efficacy, freedom from side effects, and analgesic content of Anacin and APF. In particular, the complaint alleged that AHP advertised Anacin and APF without disclosing that the analgesic ingredient in these products is ordinary aspirin (Complaint ¶ 22), and that AHP had, directly or by implication, made the following claims, which were alleged to be false, deceptive or unfair:

(1) the analgesic ingredient in Anacin and APF is unusual, special, and stronger than aspirin (Comp. ¶ 8(A)(2) and 8(B)(1));

(2) Anacin contains more pain-relieving ingredients per tablet than any other over-the-counter internal analgesic (Comp. ¶ 8(A)(1)), and more than twice as much of its analgesic ingredient as any other analgesic product (Comp. ¶ 8(A)(3));

(3) a recommended dose of Anacin is more effective for the relief of pain than a recommended dose of any other OTC internal analgesic (Comp. ¶ 12(A));

(4) it has been established, or proved by scientific tests or studies by experts qualified by scientific training, that Anacin is more effective than any other OTC analgesic for the relief of headache pain (Comp. ¶ 10(A)), and as effective for the relief of such pain as the leading prescription analgesic (Comp. ¶ 17);

(5) within approximately 22 seconds after taking Anacin a person may expect relief from headache pain (Comp. ¶ 8(A)(4));

(6) Anacin relieves nervousness, tension, stress, fatigue, and depression and will enable persons to cope with the ordinary stresses of life (Comp. ¶ 15);

(7) doctors prefer and recommend Anacin for the treatment of headache pain over any other OTC internal analgesic (Comp.¶ 20);

(8) APF causes gastric discomfort less frequently than any other OTC internal analgesic (Comp. ¶ 10(B)); and its freedom from such side effects has been established (Comp. ¶ 12(B)); and

(9) APF will eliminate all pain, stiffness, and discomfort usually experienced by arthritis sufferers in the morning (Comp. ¶ 8(B)(2)). [3]

AHP's advertising agency, Clyne, was charged with responsibility only for the claims relating to APF.

Hearings were held before Administrative Law Judge (ALJ) Montgomery K. Hyun, who rendered an initial decision finding against respondent AHP on all allegations of the complaint except that concerning the noncomparative efficacy claim for APF (Comp. ¶8(B)(2)). The charges against Clyne were dismissed with the

exception of that relating to APF's unusual ingredient claim (Comp. ¶8(B)(1)).

Judge Hyun's order would require AHP to disclose the presence of aspirin in any OTC drug advertisement, and to disclose the presence of any commonly known ingredient in Anacin, APF or any other OTC drug product when an advertisement refers to common ingredients directly or by implication. It would also prohibit false claims that an ingredient is unusual. The order would set certain standards for comparative efficacy or side effects claims for OTC drug products: claims that the superiority of such a product has been established would be required to be supported by at least two adequate clinical tests, and other comparative ads would be required to disclose that the claims have not been proven. Misrepresentations of test or survey results would be prohibited.

The order would also bar AHP from making tension relief claims for Anacin, unsubstantiated claims that AHP's products will relieve headache pain in any period of time, and any other noncomparative efficacy or safety claim for an OTC analgesic without reliable scientific evidence. The ALJ's order would also require AHP to include in all Anacin advertising the statement "Anacin is not a tension reliever" until a sum equal to the average annual Anacin advertising budget for a certain period of years has been spent. Finally, it would prohibit Clyne from falsely representing that APF, or any other OTC analgesic, contains an unusual ingredient.

The matter is before the Commission on the appeals of respondents and complaint counsel from the initial decision and order. Respondents' principal contentions on appeal are that (1) the ALJ erred in finding that certain of the representations alleged in the complaint were made in AHP's advertising; (2) the clinical testing standard imposed by the ALJ's order for comparative claims is without support in the record; (3) the principal advertising claims are supported by adequate medical and scientific evidence; and (4) the provisions of the order are overbroad, unsupported by the record, or in violation of respondents' First Amendment rights. Complaint counsel take exception to the ALJ's failure to order corrective advertising to remedy asserted lingering effects of AHP's comparative efficacy claims for Anacin, as well as his decision not to impose liability on Clyne for all APF claims. In all other respects, complaint counsel argue in support of the ALJ's findings and conclusions. [4]

As this overview indicates, the allegations in this case primarily charge respondents with conveying the superiority of Anacin and APF over competing analgesics through a variety of allegedly misleading techniques. They are alleged to have used false claims,

deceptive omissions of material fact, and claims which were neither substantiated by the methods of proof required in the relevant scientific community nor adequately qualified to reveal the lack of such proof. In our discussion below, we will review each alleged claim or omission in turn, to determine first whether the alleged representation was made and then whether it is false, deceptive or unfair within the meaning of the FTC Act. The comparative claims will be discussed first, and then the noncomparative claims which were also challenged in the complaint.[3] [5]

I. *"Unusual Ingredient" Claims; Failure To Disclose Aspirin*[4]

The ALJ sustained the allegations of the complaint charging respondents with claiming falsely that the analgesic ingredient in Anacin and APF is unusual, special and stronger than aspirin (Comp. ¶ 8(A)(2) and 8(B)(1)), and with failing to disclose that the analgesic ingredient in these products is ordinary aspirin (¶ 22). AHP appeals these findings.

We note first the relevant factual background. The only analgesic ingredient in either Anacin or APF is aspirin. F.F. 387, 391. The active ingredients in Anacin are aspirin (400 mg. per tablet) and caffeine (32.5 mg.). The active ingredients in APF are microfine (micronized) aspirin (486 mg. per tablet) and two antacids (dried aluminum hydroxide gel (20.14 mg.) and magnesium hydroxide (60.42 mg.). F.F. 11, 14. Aspirin is a commonplace substance, available in many products. F. 387. Indeed, with almost 19 billion dosage units sold annually, it is the most widely used analgesic in the United States. F. 14. There can thus be no doubt about the falsity of any advertisements representing the analgesic ingredient in Anacin or APF to be unusual, special, or stronger than aspirin.[5]

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[3] The following abbreviations are used in this opinion:

F.	–	Initial Decision, Finding No.
I.D. p.	–	Initial Decision, Page No.
CX	–	Complaint Counsel's Exhibit No.
RX	–	Respondent's Exhibit No.
Tr.	–	Transcript of Testimony, Page No.
TROA	–	Transcript of Oral Argument Before Commission
R.A.B.	–	Respondent's (AHP's) Appeal Brief
C.C.A.B.	–	Complaint Counsel's Appeal Brief

[4] Respondents presented several arguments on appeal concerning the ALJ's methods of determining the meanings conveyed by the challenged advertisements. We have addressed those arguments fully in the Appendix attached to this opinion.

[5] As a federal court has commented, "A claim of superior analgesia for Anacin compared to [aspirin] would be nonsensical since the only analgesic ingredient in Anacin is [aspirin]." *American Home Products Corp.* v. *Johnson & Johnson*, 436 F. Supp. 785, 801 (S.D.N.Y. 1977), *aff'd*, 577 F.2d 160 (2d Cir. 1978).

While respondents do not contest the finding that such claims are false, AHP argues on appeal that its advertising did not represent Anacin's and APF's analgesic ingredient to be unusual, special, and stronger than regular aspirin. We believe the ALJ's finding that these claims were made is amply supported by the advertisements themselves as well as by expert testimony (F.F. 85–98, 171–77).

The advertising campaign for these products consisted of an attempt to differentiate them from ordinary aspirin, as respondents' witness testified (Smith, Tr. 7550–51). Indeed, that was the company's objective, according to Mr. DeMott, the president of AHP's Whitehall Laboratories Division, who had responsibility [6]for advertising and marketing of Anacin (DeMott, Tr. 4659). On the basis of the small actual differences in formulation between the Anacin (and APF) compounds and plain aspirin, respondents' advertisements have created an impression that the products are based on some special, unusually strong pain reliever entirely different from and superior to aspirin. Whenever aspirin is named in the Anacin ads, it is used in such a way to contrast it with Anacin and associate it with Anacin's competitors. None of the challenged Anacin advertisements discloses that the analgesic ingredient in Anacin itself is, in fact, aspirin; instead, the identity of Anacin's ingredient is in every single instance obscured with phrases like "the pain reliever doctors recommend most" and "this specific fast acting ingredient against pain."

For example, in one series of advertisements it is claimed:

> Anacin starts with as much pain reliever as the leading aspirin tablet. Then adds an extra core of this specific fast-acting ingredient against pain (CX 41A-45A).

In this series a scale is shown, with one side labeled "ANACIN TABLET" and the other "ASPIRIN TABLET." Other advertisements claim:

- Anacin isn't just like an ordinary aspirin tablet. It has more of the drug doctors themselves most choose to relieve pain (CX 173);

- anacin rushes to your head more pain reliever than the leading aspirin tablet * * * more than the leading buffered aspirin tablet * * * more of the pain reliever doctors recommend most (CX 46A);

- Anacin tablets are so effective because they are like a doctor's prescription. That is, a combination of ingredients. Anacin contains the pain reliever most recommended by doctors plus an extra active ingredient not found in leading buffered aspirin * * *. The big difference in Anacin makes a difference in the way you feel (CX 151).

The strained syntax of many of the advertisements (*e.g.*, CX 41–45A)—in which the references to Anacin's analgesic ingredient do

not appear to relate back to the word "aspirin"—fosters the impression that Anacin contains something other than [7]aspirin (Ross, Tr. 1891–92). The clear import of these advertisements is that the analgesic ingredient in Anacin is something other than aspirin (Ross, Tr. 1880, 1882, 1896).[6]

In addition, in many of the advertisements, Anacin is described as an "exceptional" (CX 26A, 28A) or "special fortified" formula (CX 89, 93–94, 115–17, 142–44, 146, 154–56), or as containing "an extra active ingredient not found in leading aspirin or buffered aspirin tablets" (CX 151). The record shows that consumers would reasonably have understood such claims to refer to an analgesic ingredient, and therefore to mean either that Anacin contains no aspirin, or that it contains something in addition to aspirin which significantly contributes to the analgesic function of the product (Ross, Tr. 1892–96; CX 404 at p. 37).

The challenged APF advertisements (CX 201–07, 210, 217–18) make similar claims by the same techniques. Through statements specifically contrasting APF's analgesic ingredient with aspirin (*e.g.*, CX 201, 203–07, 210), and representations about the "specialness" of its formulation, (*e.g.*, CX 210, 217–18,), respondents' advertising suggested that the analgesic ingredient in APF was something other than aspirin (Ross, Tr. 2303–05).

The combination of affirmative misrepresentations and consistent failure to identify the actual analgesic ingredient in Anacin and APF not only implies that something other than aspirin distinguishes AHP's products, but also has a capacity to cause consumers to believe the products do not contain any aspirin. Expert testimony in the record indicates that respondents' ads are likely to mislead consumers in this manner (*e.g.*, Ross, Tr. 1880–83, 1892–3, 1896, 2303–5). Other evidence, including testimony of experts on both sides as well as several consumer surveys, shows that a significant proportion of consumers is in fact unaware that Anacin contains aspirin. (See generally F. 402, 457–464, and CX 451, CX 452, CX 468, Shapiro, Tr. 2989–5; Moertel, Tr. 985; Stevenson Tr. 1509.) [8]

In light of these findings, we conclude that respondents' representations about the analgesic ingredient in Anacin and APF, and, in

[6] Dr. Smith, respondents' expert on advertising interpretation, stated that some consumers would have understood ads such as CX 41 and CX 173 to mean that Anacin's analgesic ingredient is something other than aspirin (Smith, Tr. 7551–53, 7557–58), although in his view the image and penetration data and the ASI studies tend to show that the representation alleged was not conveyed. As we discuss in the Appendix to this opinion, the image and penetration data provide little guidance on the meaning of the specific ads we have before us. Moreover, in our view, ASI copy tests conducted on the "extra core" ads provide confirmatory evidence of the ALJ's findings. See CX 421 at pp. 28, 30–33, 35–36, CX 422 at pp. 27, 29–30, 33, 34.

the context of these representations the failure to disclose the presence of aspirin, had a capacity to mislead consumers.[7] A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer's decision to purchase the product. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Section 15 provides that an omission may be material "in the light of representations made or suggested . . . or material with respect to consequences which may result from the use" of the product.

There can be little doubt about the materiality to buyers of Anacin and APF of the fact that the unnamed analgesic ingredient is ordinary aspirin, in light of the representations made and suggested in the ads that the substance is unusual and special, described above. The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers. In addition, the actual identity of the ingredient takes on particular significance due to the potentially serious consequences which may result from aspirin consumption, demonstrated by the record here. Aspirin may cause adverse side effects such as dyspepsia for some individuals (Grossman, Tr. 828; Plotz, Tr. 1044). For others, including asthmatics, a dangerous allergic reaction to aspirin is possible. (Falliers, Tr. 3187; Moertel, Tr. 1012; Stevenson, Tr. 1474). The Report for OTC Internal Analgesics (CX 367) of the Food and Drug Administration's (FDA) advisory review panel (a panel of outside experts established by FDA to review the safety and efficacy of OTC drugs)[8] summarizes the possible adverse side effects of aspirin, which range from massive gastrointestinal bleeding (which may be fatal) to hepatic (liver) [9] dysfunctions (CX 367014).[9] For example, aspirin may interfere with

[7] It has long been held that deception can occur by material omission as well as affirmative statement. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d 294 (7th Cir. 1979), *cert. denied* 445 U.S. 950 (1980); *Simeon Management Corp.* v. *FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978); *J.B. Williams Co.* v. *FTC*, 381 F.2d 884 (6th Cir. 1967). Section 15 of the FTC Act, 15 U.S.C. 55, specifically provides that a drug advertisement may be false under Section 12 for a misleading failure to reveal material facts.

[8] For a more complete discussion of FDA's regulatory scheme, see *infra* at 20–24.

[9] Respondents' objections to the admission into evidence of the FDA Panel Reports (CX 366 and CX 367), R.A.B. at 25 n.**, are without merit. AHP contends that the reports are inadmissible because they are hearsay and are preliminary documents subject to revision. It has long been acknowledged, however, that "administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence." *FTC* v. *Cement Institute*, 333 U.S. 683, 706 (1948). Under the Commission's Rules of Practice, all relevant and material evidence—whether it is hearsay or not—is admissible, as long as it is reliable. 16 C.F.R. 3.43(b). The information contained in the panel reports is unquestionably material and relevant, and we believe scientific reports prepared by groups of experts for the FDA pursuant to its regulations to be presumptively reliable. Respondent has given us no reason to doubt the trustworthiness of the findings and conclusions of the panels.

Our determination of reliability is bolstered when the exceptions to the hearsay rule are considered. The reports would fall under the well-recognized exception for public records and reports, codified in the Federal Rules of Evidence at Rule 803(8). This exception is premised both on necessity and on the inherent trustworthiness of official records. 4 *Weinstein's Evidence* ¶ 803(8)[01], at 803–189 (1979). Under this exception, and under case law developed prior to the codification of the Federal Rules, records of administrative proceedings have been admitted

(Continued)

normal blood clotting, increase internal bleeding, cause peptic ulcers, increase the incidence of neonatal deaths, depress the central nervous system, and cause anemia. For individuals with aspirin allergies, according to the Report, ingestion of aspirin may result in shortness of breath, laryngeal swelling from anaphylactic shock, blocking of air pathways, and a sudden drop in blood pressure (*id.*). [10]

Respondents argue that only a small number of individuals suffer these adverse side effects from aspirin consumption (R.A.B. at 65–67). The ALJ found, however, and we agree, that the number of individuals who may be adversely affected by aspirin is significant. F. 453.[10] We note that the FDA's Internal Analgesics Panel considered the problems associated with aspirin great enough to recommend that the labeling of all products containing aspirin carry an aspirin disclosure.[11] The FDA Panel also stated its agreement with the 1973 resolution of the American Academy of Allergy recommending that advertisements promoting formulations containing aspirin clearly indicate that they contain aspirin. CX 367Z028–29.[12] In addition, the Panel expressed its view that the consumer "needs to be correctly and fully informed" about OTC analgesics, and that advertising of OTC analgesics may not provide adequate warnings about their potential hazards. CX 367L. In this context, the Panel noted that the FDA does not regulate the advertising of OTC drugs, and thus requested that "the proper authority, *i.e.*, the Federal Trade Commission * * * more effectively regulate the commercial advertising of internal analgesic[s] * * * on the basis of the labeling recommendations contained in this document [the Panel's Report]." *Id.*

The ALJ also stated that the presence of aspirin is material "from an economic point of view" (I.D. at pp. 207–08), and complaint counsel argue in support of this proposition on appeal (*e.g.*, Complaint Counsel's Ans. Br. at 65). If the record contained evidence of a significant disparity between the prices of Anacin and plain aspirin, it would form a further basis for a finding of materiality. That is, there is reason to believe consumers are willing to pay a premium for

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into evidence by the courts. See Weinstein, *supra* Section 803(8)[03] at 803–202. Moreover, submissions to an administrative agency from an outside person that have become part of the agency's official file have also been admitted. See *Sternberg Dredging Co.* v. *Moran Towing & Transp. Co.*, 196 F.2d 1002, 1004–05 (2d Cir. 1952); Weinstein, *supra*, ¶ 803(8), at 803–197.

[10] For example, two out of every 1,000 hospital admissions were caused by aspirin-related problems (CX 367Z022) and approximately one-eighth of all gastric ulcers are related to aspirin (CX 367Z021).

[11] The recommended disclosure would read, "This product contains aspirin. Do not take this product if you are allergic to aspirin or if you have Asthma except under the advice and supervision of a physician." CX 367Z029. See also CX 367(0).

[12] The American College of Allergists passed a similar resolution. Farr, JTr. 2608–12.

a product believed to contain a special analgesic ingredient, but not for a product [11]whose analgesic is ordinary aspirin.[13] The record contains no evidence on comparative prices, however,[14] and our finding of materiality is not based on the suggested economic effects.

Respondents also suggest that the labeling of OTC drugs with their active ingredients provides sufficient notice to the consumer that a product contains aspirin (R.A.B. at 64 n.**). We note first, however, that when the first contact between a seller and buyer occurs through a deceptive advertisement, the law is violated even if the truth is subsequently made known to the purchaser through information on the label. *Carter Products, Inc.* v. *FTC*, 186 F.2d 821 (7th Cir. 1951). The record is replete with evidence, moreover, including the testimony of respondents' own witnesses, that in spite of the fact that aspirin is listed on the label, many consumers are unaware of the aspirin content of Anacin, APF and other OTC drugs (F.464; Shapiro, Tr. 2984–85; Falliers, Tr. 3264; Lasagna, Tr. 4194; Moertel, Tr. 985, 1019). It is for this very reason that the FDA Panel recommended that the FTC regulate advertising of OTC drugs in accordance with the Panel's labeling recommendations (CX 367L). Finally, given that respondents' Anacin and APF advertising implied by omission and affirmative misrepresentations that the products did *not* contain aspirin, it is even less likely that labeling disclosures can be adequate in this context to alert people to the presence of aspirin in the products.

For all of these reasons, we hold that respondents' misrepresentations about the analgesic ingredient in its products, and the related failure to disclose the presence of aspirin, constitute a violation of Sections 5 and 12 of the FTC Act. [12]

II. *Comparative Efficacy and Side Effects Claims*

A. Introduction

The complaint contains two sets of allegations challenging respondents' comparative claims, discussed separately in Parts B and C below. First, Paragraphs 10 and 11 of the complaint charged that

[13] We also suspect, based on common experience in the marketplace, that a sizable price disparity between Anacin or APF and plain aspirin could in fact be shown. A comment by respondent's counsel, on oral argument before the ALJ, lends some support to this suspicion:

> Judge Hyun: You don't deny the fact that Anacin is more expensive than plain aspirin?
>
> Mr. Murphy: Than some aspirin. I have no knowledge, Judge. I know that I can buy A&P aspirin for less than I can buy Bayer aspirin. And I presume I can buy it for less than I can pay for Anacin.

Tr. 7916.

[14] An article in "The Medical Letter" which includes data purporting to show a difference between the price of Anacin and that of other aspirin-based products, including generic aspirin, was admitted into evidence. CX 363C. However, the remarks of Judge Hyun and complaint counsel at the time the article was admitted make clear that it was not received for the purpose of establishing the relative prices of the products. JTr. 2841–43.

respondents represented falsely that Anacin's superior efficacy for pain relief and APF's superior freedom from side effects (gastric discomfort) have been "established." In Part B, we consider the alleged representations of establishment (proof), the scientific view of the meaning of proof in this context, and the existence of the requisite proof.

Paragraphs 12, 13 and 14 of the complaint charged that respondents represented that Anacin is more effective, and that APF will cause less gastric discomfort, than any other OTC analgesic, without disclosing that at the time these claims were made there existed a substantial question recognized by qualified scientific experts concerning the validity of such representations. Under these charges, claims representing the superiority of AHP's products even without the use of direct references to scientific proof, research, tests or the like were alleged to be unfair or deceptive due to the existence of and failure to disclose a "substantial question." Part C below reviews this set of allegations.

Before addressing the "established superiority" and "failure to disclose a substantial question" allegations in turn, however, we must consider two arguments AHP has raised concerning exactly what comparative representations were made, as they relate to both the sets of allegations covered in Part B and Part C. Respondents contend, first, that the advertisements stating that Anacin contains more analgesic ingredient than competing products[15] did not represent that Anacin is more effective (R.A.B. at 38–39). In our view, however, there is little room to doubt the ALJ's conclusion that the references in those ads to the amount of "pain-reliever" or "pain-relieving ingredient" would reasonably have been understood by consumers as meaning that the product is more effective for relief of headache pain. See generally F.F. 71–73, and I.D. at 166–67. [13]

Respondents argue more strenuously that the ALJ erred in concluding (F.F. 66–84, 116–47, 181–89) that any claims were made for the superiority of its products over *all other* OTC analgesic products, and assert that its advertising in fact made only limited comparisons to specific products. R.A.B. at 35–39. In support of its contention, AHP cites chiefly the results of image and penetration studies. Yet as we explain more fully in the Appendix, such studies provide only limited guidance on the meaning consumers take from specific ads, and they cannot in any event establish the negative: that an individual ad did *not* convey a particular meaning.

We find that the ALJ's conclusion was correct. First, some of the

[15] See F. 66.

ads make sweeping comparisons expressly. For example, in CX 9 and CX 164 the audio portion begins as follows: "With all of the pain relievers in the world to choose from . . ."[16] The record shows that consumers could reasonably have understood this language to refer generally to all analgesics on the market. See, *e.g.*, Ross, Tr. 1879.

In other advertisements, Anacin or a characteristic of Anacin is compared favorably with "aspirin, buffered aspirin or the so-called extra-strength tablet."[17] Respondents' own expert conceded that at the time the advertisements were disseminated, all of the major OTC analgesic products fell into one of those three categories. Consequently, consumers could reasonably have interpreted the enumerated categories as an exhaustive listing of all OTC analgesics (Smith, Tr. 7503–04). [14]

In addition, in some ads Anacin's efficacy is compared with "the other leading extra-strength tablets"[18] or "any other leading headache tablet."[19] We believe that consumers could reasonably interpret these claims to mean that Anacin is better than what are otherwise the best products in the category. See Ross, Tr. 1870. While respondents' expert Dr. Smith stated that in his view it was unlikely that a significant number of consumers would understand "the other leading products" to refer to all other OTC analgesics, he nevertheless conceded that "some not insignificant number of consumers" would interpret that language to mean the best products in that product category (Tr. 7505–07). He later testified that products perceived to be "better than the best" are also necessarily perceived to be "better than all the others" (Tr. 7516).

Finally, in still other advertisements respondents claimed that tests have proven that Anacin is as effective as the leading *prescription* analgesic. CX 81–84, 105–07, 126–37, 141, 173–77, and 179. AHP has admitted that certain ads represented that tests and studies show Anacin is as effective for the treatment of headache pain as the leading prescription product. Ans. of AHP ¶ 17; Tr. 406–07. There is testimony in the record indicating that because

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[16] See also CX 13A, 14A.

[17] In CX 152, for example, it is claimed:

EXTRA POWER * * * Anacin contains the pain reliever doctors recommend most. And Anacin gives you more of this pain reliever than aspirin, buffered aspirin or the so called extra-strength tablet * * *. See if Anacin tablets do not work better for you. CONTAINS WHAT 2 OUT OF 3 DOCTORS CALL THE GREATEST PAIN FIGHTER EVER DISCOVERED.

The same or similar language is used in, *e.g.*, CX 105, 107.

[18] For example, in CX 21A–22A it is claimed as follows:

Two Anacin tablets have more of the one pain reliever doctors recommend most than 4 of the other leading extra-strength tablets * * *. Anacin contains more of the specific pain reliever than 4 of the others.

Substantially the same language is found in CX 1A, 9, 23A, 163–64, 170–71.

[19] In CX 20A, for example, it is claimed: "Anacin tablets have more of the one strong pain reliever doctors specify most. More than any other leading headache tablet." CX 13A–14A, 25A, 39A–40A, 142A–44A and 153A contain the same or similar language.

prescription drugs are generally perceived to be stronger and more effective than non-prescription products, consumers could reasonably understand these representations to mean that Anacin is more effective than all other OTC analgesics (Ross, Tr. 1933–34, 1937–40, 1941; Smith, Tr. 7576).

For all of these reasons, we affirm the ALJ's conclusion as to the breadth of respondents' comparative claims for Anacin.[20] In addition, the challenged advertising made claims for APF's comparative freedom from side effects (gastric discomfort) [15]using statements to the effect that its "double-buffering" makes APF gentle on the stomach. See, *e.g.*, CX 203A, 204A–206A. Consumers could reasonably have understood "double-buffering" to mean that APF has twice as much buffering as the otherwise most buffered brand in the product category (Ross, Tr. 2306–08). As even Dr. Smith conceded, many consumers (especially those suffering from arthritis) believe that buffered products are more gentle to the stomach than regular, unbuffered aspirin (Smith, Tr. 7645); the "double buffering" representation therefore suggests that APF is less likely to cause discomfort than any other OTC analgesic.

B. Proven ("Established") Superiority (Complaint ¶¶ 10 and 11)

We must determine next whether any of respondents' ads represented that the products' superiority is proven (or "established") as alleged, and, if so, what type and degree of support constitutes such proof and whether the record demonstrates that such proof exists.

1. Claims of Scientific Proof

The ALJ found that respondents represented that Anacin's superior efficacy for pain relief and APF's superior freedom from side effects (gastric discomfort) are proven or established, and that these representations were conveyed through a variety of statements referring to scientific studies and expert opinion in conjunction with references to the superiority of Anacin and APF (F.F. 132–47, 186–89). Respondents deny that any of their advertisements conveyed the alleged representations of proof (R.A.B. at pp. 34–35).

The Commission finds that many of the challenged Anacin

[20] There is no dispute that the claims of more pain relieving ingredients per tablet than any other OTC analgesic, and more than twice as much analgesic ingredient as any other OTC analgesic, are both false as alleged in the Complaint, ¶¶ 8(A)(1) and 8(A)(3). See Noncontested Issues of Fact 11 and 12 (F.F. 194, 193).

advertisements, when viewed in their entirety, did convey the message that the superiority of this product has been proven.[21] It is immaterial that the word "established," which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public. See *Carter Products Inc.* v. *FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Many of the ads do make explicit reference to underlying medical or scientific proof.[22] For example, CX 154 claims **[16]**in pertinent part: "*Medical research has definitely established* that the most reliable medication in the treatment of arthritis * * * is the compound in today's Anacin Tablets * * * . Anacin's great pain fighter is the first choice of doctors * * * " (emphasis added). Claims such as "medically-proven Anacin" were used repeatedly.[23] This language could reasonably be understood by consumers to mean that Anacin's superior efficacy has been established as a matter of medical or scientific fact (Ross, Tr. 1926). In addition, many of the challenged advertisements cite the results of "doctors' tests," "medical reports," "scientific research," or "clinical tests," specifically announcing that the studies were performed by physicians and in some instances that the results appeared in medical journals.[24]

Each of the advertisements in this latter group also contains an express claim that the specified study or test "proves" "substantiates," "shows," or even (CX 107) proves "beyond a doubt" that Anacin is as effective as the leading prescription analgesic. As we noted *supra* at 14, consumers may reasonably understand that prescription drugs are stronger and more effective than OTC products, and therefore would reasonably understand such representations to signify that Anacin was also proven by scientific tests to be more effective than any other OTC analgesic.

Finally, the express claims are in some instances coupled with a description of the controls purportedly used in conducting the tests,[25] or references to the results of doctors' surveys,[26] **[17]**which are asserted to demonstrate a preference for Anacin's pain relieving

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[21] The ALJ also found, citing only CX 204 (and 204A), that respondents made similar claims of proof for APF's comparative freedom from side effects (F.F. 186–89). The Commission does not believe that such representation can reasonably be found in these or any other APF ads in the record.

[22] See, *e.g.*, CX 81–84, 105–07, 115–17, 126–37, 141–44, 154, 176–79.

[23] *E.g.*, CX 115–17, 142–44, 149.

[24] See CX 81–84, 105–07, 126–37, 141, 173–77, 179.

[25] CX 128–30, for example, describes how the tests were performed:

> These tests were conducted by physicians who specialize in scientific research. The tests were done in a clinic of one of the nation's largest electronic plants on hundreds of men and women who often get headaches from the exacting precision work they do. Half the patients were given Anacin and the other half given the prescription. Neither the patients nor the doctor knew which tablet was given until the results were reviewed.

See also CX 141 ("clinical evidence in a double blind randomized study").

[26] CX 81–84, 176–77, 179.

ingredient. The net result in each case is an implicit suggestion that the superior efficacy claims for Anacin had been proved to the satisfaction of the medical-scientific community.

In addition to the explicit references to medical or scientific proof, AHP also used depiction of technical graphs and chemical formulas to convey the suggestion that the claimed superior efficacy claims for Anacin are supported by scientific proof.[27] For example, the video portion of CX 15A shows a series of benzene rings representing the chemical structure of aspirin. These are used in the challenged advertisement to contrast the amount of pain-reliever contained in Anacin with that contained in the "other well-known extra-strength tablet."[28] The prominent display of medical reference texts in some ads (CX 14A) reinforced the suggestion that the claims rest on medical evidence or authority. Respondents' own expert testified that consumers believe that medical treatises are based on scientific evidence (Smith, Tr. 7589–90).

Similar advertising techniques have previously been held to imply the existence of scientific proof. For example, in *Porter & Dietsch*, *supra*, 90 F.T.C. at 865, we found that explicit references to clinical tests were used to convey [18]the suggestion that claims of weight loss for users of the diet tablets at issue in that case were substantiated by "competent scientific proof." On the other hand, in *Pfizer, Inc.*, 81 F.T.C. 23 (1972), complaint counsel argued that certain advertising claims for "Unburn" contained implied representations of scientific proof, but we upheld the ALJ's finding that the implied representations of scientific testing had not been made. In that case, however, we noted specifically the respondents' argument that "the total setting of the ad, the frivolous nature of the dialogue, the use of a bikinied model, and the general 'aura of sexiness' prevent the ad, taken as a whole, from carrying the scientific overtones argued by complaint counsel." *Pfizer, Inc.*, *supra*, 81 F.T.C. at 59. AHP's advertising of Anacin is easily distinguished. As we described above, some of AHP's ads expressly referred to scientific or medical proof, and others used imagery strongly suggesting scientific

[27] Nonverbal images such as pictorial elements and graphics are capable of conveying deceptive advertising messages. *ITT Continental Baking Co.*, 83 F.T.C. 865, 959–60 (1973), *modified on other grounds*, 532 F.2d 207 (2d Cir. 1976).

[28] Other advertisements, aired after the complaint issued (CX 50A–54A, CX 56A–58A, and CX 61), display a form of graph superimposed on a profile of the headache sufferer, which purports to measure levels of aspirin in the blood and to reflect the comparative efficacy, in terms of speed and strength, of Anacin, buffered aspirin, and plain aspirin. The record shows that at least some consumers would understand the claim regarding the differences among pain relievers in the bloodstream to be based on authoritative medical opinion (Ross Tr. 1924–25) or scientific tests (Smith, Tr. 7588–89). In some of these advertisements, a figure dressed as a doctor or pharmacist, or seated in what appears to be a professional office, uses the graph or formulas to explain why Anacin is more effective than its competitors. Verbatim comments recorded in one ASI copy test document the tendency of consumers to perceive the spokesperson in such an ad as a doctor or pharmacist (see CX 425 at p.27).

or medical support. Reading these ads, as we must, for their total or general message to the consuming public, we conclude they contain a claim that Anacin's superior efficacy is proven by competent scientific evidence.

2. Requisites of Scientific Proof

The record reflects no real dispute as to the type of evidence scientists require before they regard it as having been proven (established) that one drug is more effective than another. Complaint counsel and respondent called numerous expert witnesses on the issues related to medical and scientific substantiation of the claims made in the advertisements. From their testimony, it is clear that at least since the early 1950's well-controlled clinical testing (*i.e.*, the observation and analysis of pain and relief in patients suffering actual pain) conforming in design and execution to generally recognized criteria have been required to establish or prove absolute or relative drug efficacy (Azarnoff, Tr. 600–01; Moertel, Tr. 942–43, 956–57, 1021–25, 1028; DeKornfeld, Tr. 2777–78, 2780–81, 2785–86; Lasagna, Tr. 4119, 4142-44, 4177–78; Forrest, Tr. 447, 449–50, 472–73; Rickels, Tr. 1228–29; Wallenstein, Tr. 3490). The use of generally recognized standards serves to reduce the chance of systematic bias entering into clinical studies (Moertel, Tr. 943–44; DeKornfeld, Tr. 2778–79; Lasagna, Tr. 4142).

Experts in the field of clinical testing of analgesics are generally agreed on the requisites of a well-designed clinical study (Azarnoff, Tr. 463). Pre-existing bias toward the tested product on the part of the subjects or those involved in the execution of the study must be eliminated. To this end, the well-designed clinical study should be double-blinded—that is, neither the subjects nor those conducting the study should be able to identify the test drugs until preliminary analysis of the data is complete [19](Forrest, Tr. 444, 457–58; Moertel, Tr. 948; DeKornfeld, Tr. 2778–82; Wallenstein, Tr. 3488; Lasagna, Tr. 4123, 4126, 4128).[29] The record shows that the expectations of both subjects and observers can affect the amount of relief obtained from the tested drug, and that this is a major source of bias in clinical testing (DeKornfeld, Tr. 2782). Pre-existing bias toward the tested product is a particularly significant factor in working with OTC analgesics, which are readily identifiable by color, shape, or other distinctive attributes (DeKornfeld, Tr. 2782). Random distribution of the subject population among treatment groups

[29] In some instances (*e.g.*, a study of acupuncture), a double-blinded study may not be possible. It is critical, however, in comparative studies involving subjective response information (Forrest, Tr. 554–55).

further balances out variables and biases not otherwise controlled for (Forrest, Tr. 444; Azarnoff, Tr. 601; Wallenstein, Tr. 3488; Lasagna, Tr. 4123). The development of a written protocol, which sets out in advance the purposes of the study, the number and types of patients to be studied, the parameters to be evaluated, and the analytic techniques to be used in evaluating the results, protects against biases which might develop during the course of execution or analysis through manipulation of the data (Azarnoff, Tr. 604–05, 605–09, 643; Moertel, Tr. 947–48, 952; DeKornfeld, Tr. 2778–2783; Lasagna, Tr. 4124, 4858–59).

The record also shows that the customary practice in drug comparison studies is to require a pharmacologically inactive treatment (placebo control) as a direct measure of test sensitivity. Placebo control is particularly important in the case of analgesic studies because a subjective response like pain relief is highly susceptible to influence by the subject's expectations (Okun, Tr. 4419). In clinical studies of mild to moderate pain, the rate of positive response to a pharmacologically inactive rate has been as high as 60% (Forrest, Tr. 496; Lasagna, Tr. 431–33). The inert substance serves as a control for perceived pain relief based on expectations alone, or attributable to the self-limiting nature of mild to moderate pain (Forrest, Tr. 444, 446, 459–61; Azarnoff, Tr. 605–06; Moertel, Tr. 950; DeKornfeld, Tr. 2785; Lasagna, Tr. 4128, 4130, 4134).[30]

In addition, if the objective is to determine comparative drug efficacy, the tested products should be evaluated in the same study (together with a placebo). Without such head-to-head studies, the investigator is unable to determine whether products vary from each other to a significant degree (Azarnoff, Tr. 605–06). Finally, scientists have historically required the results of clinical studies showing a difference among drugs to be statistically significant to the 95% level of confidence. This insures that the likelihood of the results being attributable to chance will not be greater than 5% (Forrest, Tr. 456; Azarnoff, Tr. 608; Moertel, Tr. 954–55; DeKornfeld, Tr. 2784; Lasagna, Tr. 4136–37; Okun, Tr. 4420). **[20]**

The record shows that a minimum of two clinical trials conforming in design to the aforementioned criteria and reaching the same conclusions and statistical significance is required to establish comparative drug efficacy. (Forrest, Tr. 449–50; Azarnoff, Tr. 601, 609–10; Moertel, Tr. 942, 956–57; DeKornfeld, Tr. 2778, 2780–81; Lasagna, Tr. 4142–44). The two-test minimum further reduces the

[30] The potential impact of the placebo effect and the self-limiting nature of some ailments have been previously recognized by the Commission. *Warner-Lambert Co.*, 86 F.T.C. 1398, 1495–96 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

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chance that any observed therapeutic value is attributable to factors other than the pharmacologic activity of the tested drug. Even in the most meticulously planned study, unknown factors that the investigator simply could not have recognized could be operative (Moertel, Tr. 956–57). Dr. Azarnoff, explained:

> One reason is to reduce the chance that there was any systematic bias in the study. That is, if you do a study in Los Angeles in a certain group of subjects, there may be something inherent in those subjects either because of the region in which they live, genetic background, environmental factors, a variety of other things, which would not be picked up because it is systematically occurring throughout all subjects. [Tr. 610–11.]

Finally, since ultimately the test of analgesic efficacy is established by the subject's response, at least one of the required studies should be conducted on the type of pain for which the superior efficacy claim is being made. Because scientists do not fully understand the mechanism by which trauma evokes pain, they are not comfortable about extrapolating from one pain situation to another, or from experimental pain models, which employ artifically induced pain, to a clinical situation (Forrest, Tr. 443–44, 447–49; Azarnoff, Tr. 610–11; DeKornfeld, Tr. 2778–80; Lasagna, Tr. 4144–45).

The criteria testified to by the expert witnesses in this proceeding are fully consistent with and reflected in regulations adopted by the Food and Drug Administration (FDA) to implement the congressional policy of drug regulation that was mandated in the 1962 amendments to the Food, Drug, and Cosmetic Act of 1938 (52 Stat. 1040).[31] The Drug Amendments of 1962 (Harris-Kefauver Act) [21] (Pub. Law No. 87–781, 76 Stat. 780), modified the 1938 Act to prohibit the introduction into commerce of "new drugs" not generally recognized by qualified experts to be effective (as well as safe) for their indicated uses.[32] (See 21 U.S.C. 321 (p)(1).) The Act requires that a new drug application (NDA) be filed with the FDA before a new drug is marketed, and the FDA is now directed to refuse approval of an NDA in the absence of "substantial evidence" that the drug is effective for its indicated uses. (21 U.S.C. 355(d) and (e)). "Substantial evidence" is defined in the Act to mean:

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[31] The FDA and the FTC of course share authority over representations about the efficacy of drugs. Although it is often stated that the FDA has authority to regulate drug labeling and the FTC has authority to regulate drug advertising, the jurisdiction in fact overlaps. The FTC has authority to challenge false or misleading labeling (*Houbigant* v. *FTC*, 139 F.2d 1019 (2d Cir.), *cert. denied*, 323 U.S. 763 (1944)), and under certain circumstances the FDA may challenge representations made in advertising (*Alberty Food Products Co.* v. *United States*, 185 F.2d 321 (D.C. Cir. 1950)). In practice, however, pursuant to a liaison agreement between the two agencies, the FTC has assumed primary responsibility for advertising and the FDA for labeling. 36 FR 18539 (1971).

[32] The Act does not define what constitutes "general recognition" among experts, but it has been held to require "substantial evidence," the meaning of which is discussed in the text. See also n.[59] at p. 35, *infra*.

evidence consisting of *adequate and well-controlled investigations, including clinical investigations,* by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended or suggested in the labeling or proposed labeling thereof.

Section 505, 21 U.S.C. 355(d)(1976) (emphasis added).[33] [22]

The legislative history of the 1962 Amendments, fully reviewed in *Pharmaceutical Manufacturers Assn.* v. *Richardson*, 318 F. Supp. 301 (D. Del. 1970), demonstrates Congress' judgment that it was imperative to require an objective determination—based on reliable scientific evaluation, not anecdote or uncontrolled study—not only that a drug is "safe" but that it produces the results claimed for it. One concern, for example, was that ineffectual treatment can lead to delays in receiving proper medical care.[34] As summarized by the Supreme Court, "The hearings underlying the 1962 Act show a marked concern that impressions or beliefs of physicians [about the efficacy of a drug], no matter how fervently held, are treacherous." *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 619 (1973).

To implement the congressional policy, the FDA has promulgated regulations which embody the essential principles of "adequate and well-controlled clinical investigations," and provide the basis for the statutory determination whether there is "substantial evidence" to support drug efficacy claims. In the FDA's own words, the criteria established by the regulations "have been developed over a period of years and are recognized by the scientific community as the essentials of adequate and well-controlled clinical investigations." 21 C.F.R. 314.111(a)(5)(ii). They include: (1) a clear statement of the objectives of the study; (2) a method of subject selection which minimizes bias, assures suitability of subjects, and assures comparability of pertinent variables; (3) an explanation of observation and

[33] The Act contains grandfather clauses that exempt certain drugs which were subject to the Food and Drug Act of June 30, 1906, and certain drugs which were in use prior to the 1962 Amendments, from the premarket clearance requirement. (21 U.S.C. 321 (p)(1)(1976); 21 U.S.C. 321 note (1976)). As AHP points out (R.A.B. at 22), the principal ingredient in Anacin and APF (aspirin) is an "old drug" which is not subject to the efficacy requirements of the Food and Drug Act. However, to fall under the first grandfather clause AHP would have to show that as to the drug marketed earlier the "labeling contained the same representations concerning the conditions of its use" as Anacin's, 21 U.S.C. 321 (p)(1), and to fall under the second grandfather clause Anacin would have to be "intended solely for use under conditions prescribed, recommended or suggested in [the] labeling" of the earlier drug, 21 U.S.C. 321 note. Moreover, aspirin combination drugs such as Anacin and APF have been subject to the OTC drug review procedures under FDA regulations. See *infra* at p. 28.

In any event, our use of the Food and Drug Act standards here as a benchmark against which to measure the adequacy of AHP's proof of efficacy does not require a determination that Anacin and APF are subject to the efficacy requirements of that Act.

[34] See, *e.g.*, comments of Sen. Kefauver (chief sponsor of the 1962 Amendments) regarding the dangers of using a drug that does not produce its purported therapeutic effects. 107 Cong. Rec. 5640 (1961). See also *United States* v. *Rutherford*, 441 U.S. 903 (1979).

recording methods, including steps taken to minimize bias on the part of the subject or observer; (4) a comparison of results with a control, in such a way as to permit quantitative evaluation; and (5) a summary of methods of analysis and an evaluation of data, including any appropriate statistical methods. (21 C.F.R. 314.111(a)(5)(ii)(a).)[35]

The requirement that at least two adequate tests be conducted is also consistent with FDA standards. Ordinarily, reports from more than one independent investigator are required to establish "substantial evidence" of drug efficacy. The applicable regulation provides in pertinent part: **[23]**

> b. An application may be refused unless it includes substantial evidence consisting of adequate and well-controlled investigations including *clinical investigations*, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved * * *.
>
> * * * * * * *
>
> c. Ordinarily, the reports of clinical studies will not be regarded as adequate unless they include reports *from more than one independent, competent investigator* who maintains adequate case histories of an adequate number of subjects, designed to record observations and permit evaluation of any and all discernible effects attributable to the drug in each individual treated and comparable records on any individuals employed as controls.

21 C.F.R. 314.1(b)(1980) (emphasis added).

The criteria for establishing efficacy were reaffirmed in the FDA procedures adopted in 1972 for reviewing the safety and efficacy of OTC drugs already on the market (21 C.F.R. 330 (1979)). The FDA established a drug review program, utilizing advisory review panels of outside experts to evaluate the safety and efficacy of OTC drugs, to review OTC drug labeling and to propose monographs establishing conditions under which OTC drugs are generally recognized as safe and effective (21 C.F.R. 330.10(a)(I)). The FDA issued general safety, efficacy, and labeling standards to be used by the panels in evaluating the data. The FDA-mandated standard of efficacy for panel review of OTC drugs provides:

> *Proof of effectiveness shall consist of controlled clinical investigations as defined in ¶314.111(a)(5)(ii) of this chapter*, unless this requirement is waived on the basis of a showing that it is not reasonably applicable to the validity of the investigation and that an alternative method of investigation is adequate to substantiate effectiveness. **[24]**

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[35] A petition for waiver of any or all of these criteria may be filed under 21 C.F.R. 314.111(a). See discussion *infra* at p. 52.

Effective December 26, 1979, the same standards—requiring substantial evidence of drug efficacy and safety based on adequate and well-controlled studies as defined in Section 314.111 (a)(5)(ii)(a)—were made applicable to indication-for-use claims in labeling for prescription drugs and also to comparative safety and efficacy claims made in prescription drug advertising (44 FR 37434, 37466–67 (June 26, 1979)).

21 C.F.R. 330.10(a)(4)(1980) (emphasis added).[36]

The advisory panel on OTC internal analgesics has specifically commented on the design of clinical studies used to evaluate analgesic drugs, and the criteria are substantially the same as those recognized by the expert witnesses in this proceeding. CX 367Z074-75. Significantly, establishment of "Category I" status (generally recognized as safe and effective) for a "Category III" compound (drugs for which the available data are insufficient to permit final classification), requires at least two studies by independent investigators conforming in design to the standards previously described. CX 367Z075.[37] [25]

3. Existence of Scientific Proof

To summarize, we have found that AHP made claims in its advertisements that Anacin's superiority over other OTC analgesics for pain relief has been proven or established by evidence considered adequate in the relevant medical and scientific community. We have also found that the scientific community requires at least two adequate, well-controlled clinical studies, meeting certain specific criteria, for proof of OTC drug claims, and that these standards are reflected in the statute and regulations under which the FDA reviews OTC drug claims. We must next determine whether Anacin's purported proven superiority has in fact been established by the requisite clinical tests.

Respondents first contend that the two studies performed by Dr. Gilbert McMahon (RX 31) "satisfy even the 'establishment' theory of substantiation," because they are two "adequate and well-controlled [clinical studies] demonstrating Anacin's superior efficacy to regular aspirin tablets" (R.A.B. at 48). We disagree, and affirm the ALJ's conclusion that the studies were so seriously flawed that they did not establish Anacin's superiority.

The McMahon studies purported to be head-on comparisons of the

[36] The FDA's statutory and regulatory requirements outlined here have been judicially upheld, as constituting an expression of well-established principles of scientific investigation." *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 617–19 (1973). There is no basis, moreover, for AHP's assertion that FDA's substantiation requirements for OTC drugs are in any respect lower than its requirements for prescription drugs (R.A.B. at 23). (The statements of former FDA Commissioner Edwards cited by respondent appear to reflect mainly his views that evaluation of prescription drugs should have a higher priority within FDA, and that a drug-by-drug approach to OTC drugs—as opposed to the type of review undertaken by the panels—appeared impractical. If Commissioner Edwards did believe the substantiation standards for the two classes of drugs should differ, that view is not reflected in any statute or regulation.)

[37] The portion of the FDA regulations that permits Category III drugs to be marketed (21 C.F.R. 330.10(a)(13)) was declared to be unlawful in 1979 because it was in conflict with the provisions of the Food and Drug Act. *Cutler* v. *Kennedy*, 475 F. Supp. 838 (D.D.C. 1979). The FDA has published a proposed revision to its regulations in response to this decision, which would delete Category III from the regulatory scheme (45 FR 31422 (1980)). The revision, which is not yet final, would not affect the standards for proof of efficacy. *Id.*

efficacy of Anacin and generic aspirin (RX 31A). The first study compared the effects of an aspirin-caffeine preparation similar to Anacin with those of generic aspirin on two types of moderate to severe post-partum pain: uterine and episiotomy pain (RX 31B). The second made the same comparison for severe uterine or episiotomy pain (*id.*). The ALJ did not credit the testimony of Dr. McMahon (McMahon, Tr. 3771) and other experts (Lasagna, Tr. 4938; Okun, Tr. 4352), that the studies demonstrated Anacin's superiority to aspirin (F. 318–20).

Several defects in the McMahon studies prevent them from providing adequate substantiation for claims of Anacin's established superiority.[38] First, neither study reached statistical significance for the entire group tested (F. 318–19). The first test did not produce statistically significant results for patients suffering from *either* type of pain, and the second did not do so for those afflicted with uterine cramping pain (*id*; McMahon, [26]Tr. 3752, 3887; Okun, Tr. 4525).[39] Second, the aspirin-caffeine combination tested against aspirin was not shown to be equivalent to Anacin in its commercial form (McMahon, Tr. 3838–39; F. 296). It is thus not clear that a test of Anacin itself would achieve similar results, since a different compound could behave differently.

Third, the effects of a particular analgesic on one type of pain are not necessarily the same as its effects on another kind of pain (F. 314). The record establishes that the particular pain for which an analgesic is intended should be used as a model in at least one of the studies conducted to establish the analgesic's efficacy (*e.g.*, Forrest, Tr. 44344; Azarnoff, Tr. 610–11; F. 204),[40] and respondents' witnesses admitted that headache pain is different from other kinds of pain (*e.g.*, Lasagna, Tr. 4148). For example, because headache pain is ordinarily self-limiting (McMahon, Tr. 3823), relief of headache pain may or may not be due to consumption of an analgesic. In addition, it is not known whether headache pain is a cramping pain (similar to

[38] In addition, we note that these tests could not show that respondents possessed and relied upon a "reasonable basis" for their claims, as respondent has asserted (*e.g.*, R.A.B. at 42), because they were conducted well after the claims had begun to be disseminated (indeed, after the commencement of this litigation). See *infra* at 40, n.[69].

[39] Even the statistically significant results for severe episiotomy pain of the second test are questionable. The study was terminated as soon as statistical significance was reached; if the study had been permitted to continue for the full length of time specified in its protocol, the results might have been different. Although Dr. McMahon testified that terminating a study when statistical significance is achieved is a commonly accepted practice (McMahon, Tr. 3843), Dr. Lasagna (one of respondent's own experts) did not agree (Lasagna, Tr. 4863).

[40] Respondents' witness, Dr. Lasagna, testified that post-partum pain is a valid model for the study of oral analgesics (Lasagna, Tr. 4055), but later stated that certain kinds of drugs may be better for certain kinds of pain than for others (Lasagna, Tr. 4068). Even assuming that results from tests involving post-partum pain can be extrapolated to headache pain (*id.*), such extrapolation remains an inference, and not established scientific fact. (See F. 317.)

uterine cramping pain) or a constant pain (like epistiotomy pain) (Lasagna, Tr. 4883).

For all these reasons, the studies did not establish Anacin's superiority over aspirin for relief of headache pain. Nor is there any basis in the record for finding Anacin to be more effective than other OTC analgesics, as the ads represented, as no clinical studies were conducted to support such a claim.

Respondents also assert, however, that "the aspirin dose response curve" proves that Anacin is more effective than regular aspirin tablets (R.A.B. at 43). A dose response curve is established by plotting points on a graph representing the average degree of pain relief (according to data from clinical studies) corresponding to different dosages of a drug, and drawing a line through the points. F.F. 226–27. Respondents argue that because the ascending shape of the dose response curve for aspirin indicates that more aspirin produces greater pain relief at some dosages, and because Anacin (with 800 mg. of aspirin) contains [27]150 mg. more aspirin per dose than common five-grain aspirin, Anacin is shown to produce more pain relief than aspirin. We believe, however, that while the dose response curve is recognized by most clinicians as useful for predicting the efficacy of a particular dosage (F. 229), for several reasons it cannot be said to establish scientifically Anacin's superiority over aspirin.

First, every point on the curve has not been scientifically established; rather, the curve is created by a series of inferences. Most of the points on the curve are in fact estimates, which are extrapolated from the few points that have been established by clinical studies (Kantor, Tr. 3572; Lasagna, Tr. 4273; DeKornfeld, Tr. 2816–17). Thus, a given dosage may or may not relieve pain to the extent indicated by the curve.[41] Even respondents' experts testified that points on the curve that have not been placed by actual studies cannot be said to have been established in a manner that is statistically significant (McMahon, Tr. 3933; Okun, Tr. 4475–76).

But more significant for our purposes is the fact that even assuming that the curve as a whole has been established, the evidence indicates that above 600 mg. the curve is either very shallow or levels off to a plateau (Kantor, Tr. 3573; Lasagna, Tr. 4881).[42] In other words, a substantial increase in dosage is necessary to produce even a small increase in pain relief (Kantor, Tr. 3573; Azarnoff, Tr. 642; F. 257), yet Anacin contains only 150 mg. more aspirin than common aspirin. Indeed, several dose-response studies

[41] F. 228–342.

[42] See F. 244–256.

showed *no* statistically significant differences in pain relief for dosages greater than 600 mg. (F. 246–55). Thus, the aspirin dose response curve cannot establish the superiority of 800 mg. of aspirin over 650 mg.,[43] or, consequently, the superiority of Anacin over aspirin (or other analgesic products).[44] **[28]**

Finally, we have determined (*supra* at p. 14) that respondents' claim of established superiority was also made implicitly through a claim that Anacin is as effective as the leading prescription pain reliever, which was Darvon Compound 65. Respondents offer as substantiation the results of two studies conducted by Dr. Lay (CX 301) and Dr. Teschner (CX 302). Neither of these studies, however, is adequate to establish that Anacin is as effective as Darvon Compound 65. The Lay study was flawed because it was not properly double-blinded (CX 301G; see Forrest, Tr. 508). The Teschner study was not double blinded (CX 302C), and did not include a placebo (Lasagna, Tr. 4200–01; DeKornfeld, Tr. 2792). Expert witnesses for both complaint counsel (Moertel, Tr. 970, 972; DeKornfeld, Tr. 2792–92; Forrest Tr. 508) and respondents (Lasagna, Tr. 4200–01; Okun, Tr. 4431) concluded that both studies had significant drawbacks.[45]

In sum, in view of the absence of adequate testing, Anacin's superiority has not been established. Where advertising representations reasonably lead consumers to understand that the claims are supported by adequate scientific testing, the claims must be documented by scientific tests. *Porter & Dietsch* v. *FTC*, 90 F.T.C. 770, 865–72 (1977), *aff'd*, 605 F. 2d 294 (7th Cir. 1979), *cert. denied* 445 U.S. 950 (1980); *National Dynamics Corp.*, 82 F.T.C. 488, 560–61 (1973), *aff'd in part, remanded on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974). AHP's advertisements conveying an unmistakable claim of proven or established superiority for Anacin are therefore false and deceptive, and constitute a violation of Sections 5 and 12 of the FTC Act. **[29]**

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[43] It is of course possible that for some individuals, an 800 mg. dosage of aspirin may provide greater relief than 650 mg. (see F. 258), but this proposition has not been established for the population as a whole, or even the average individual.

[44] As the ALJ pointed out, the fact that Anacin also contains caffeine could conceivably affect Anacin's dose response curve as compared to that of aspirin (F. 261), but there is no reason to expect the caffeine to improve pain relief since caffeine is not an analgesic (CX 367Z112).

[45] Moreover, even if Anacin were proven to be as effective as Darvon Compound 65, that would not necessarily establish Anacin's superior efficacy over other OTC drugs (Lasagna, Tr. 4202; Okun, Tr. 4436; DeKornfeld, Tr. 2794; Moertel, Tr. 978). There is some evidence indicating that regular aspirin is actually as effective as Darvon Compound 65 (*e.g.*, CX 360A (Moertel study published in *New England Journal of Medicine*); DeKornfeld, Tr. 2820). The American Medical Association's *Drug Evaluations* (a reference book for doctors with current information on drug uses and effects, CX 362N; see also Moertel, Tr. 990) states that Darvon is probably no more effective than aspirin (CX 362P). Thus, it is not clear that Anacin, even if it worked as well as this Darvon compound, would necessarily perform better than its aspirin-based competitors.

C. Failure To Disclose Existence of a Substantial Question (Complaint ¶¶ 12, 13, 14)

As we noted earlier, a second category of allegations is contained in Paragraphs 12, 13 and 14 of the complaint. The complaint alleges that in some advertisements respondents made affirmative and unqualified representations of Anacin's superior efficacy or APF's freedom from side effects[46] which, unlike the advertisements discussed in Part B above, are unembellished with specific references to underlying scientific proof or tests, or other clear indicia of scientific or medical evidence (graphs, charts, treatises, etc). See, *e.g.*, CX 1A, 9A, 20A–25A, 38A, 39A, 89A, 90A, 92A–97A, 99A, 100A, 121–24A, 160A–64A.[47] It is alleged that such advertisements are deceptive or unfair because of their failure to disclose that the claims are open to substantial question (Comp. ¶ 25). The ALJ sustained these allegations. For the reasons given below, we find that such advertisements have a capacity to deceive.

When an analgesic advertiser claims its product to be superior in performance, even without the additional explicit claim that it has been so proven, it is reasonable for consumers to construe that claim to be the assertion of a fact that is generally accepted, within the scientific community, as established. By their nature, therapeutic drug products raise special public health concerns, in light of the **[30]** risks associated with their use.[48] Harmful side effects present the most obvious danger. Other risks attending inappropriate consumption of drugs include the possibility that the consumer will forego other, necessary treatment for a medical condition, or will consume in unsafe doses an otherwise harmless product.[49] It is these latter concerns that underlay the passage in 1962 of the amendments to

[46] We explained above in Part A why we concluded that respondents' claims about the quantity of analgesic ingredient in Anacin and APF did constitute comparative efficacy claims, and that respondents' claims did compare its products to all other OTC analgesic products.

[47] Many of the ads in this category do mention briefly that "doctors recommend" or "doctors specify" Anacin's pain reliever, without any other references to or symbols of medicine, science or proof. While we believe that these indications of medical approbation can contribute somewhat to an aura of scientific authority, they do not, standing alone, constitute quite the same sort of direct, forceful representation of scientific proof as is conveyed by the techniques described *supra* at pp. 15–18. See Smith, Tr. 7587–88.

[48] See Sections 12, 13(a) and 15 of the FTC Act, under which the Commission has specific authority to seek to enjoin the dissemination of false drug advertising, and the legislative history attending passage of those provisions. Senator Wheeler commented, for example, "We are more strict with the advertising of foods, drugs, devices and cosmetics because their effect is direct and their use might endanger life." 83 Cong. Rec. 4435–36 (1938). The enactment and legislative history of the Federal Food, Drug, and Cosmetic Act, as amended, 52 stat. 1040, and the regulatory scheme that Act imposes on the marketing of OTC as well as prescription drugs, also establishes unequivocally the Congressional concern in this area. See, *e.g.*, Hearings on S. 1552 before Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong. We note, further, that in a recent judicial decision involving AHP and its representations of the superiority of Maximum Strength Anacin, the court took into account the fact that the claims had a bearing on matters of public health. *McNeilab, Inc.* v. *American Home Products Corp.*, 79 Civ. 3973, slip op. at 30 (S.D.N.Y., filed July 21, 1980).

[49] See discussion of the evidence adduced in this proceeding concerning the risks associated with aspirin, *supra* at pp. 8–10.

the Federal Food, Drug and Cosmetic Act requiring "substantial evidence" to demonstrate drug effectiveness claims, as we have described *supra* at 22. When the nature of a product is such that it gives rise to a serious safety concern, advertisers are held to a high standard of care, in order to assure to the greatest extent possible that their claims will not be misunderstood by the public. See *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 456 (1972), *aff'd* 481 F. 2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 112 (1974).[50]

In addition, the effects of many drugs, including analgesics, are such that while it is possible to verify objectively the consequences of their use, the ability to do so lies peculiarly within the power of the manufacturer; that is, the producer is uniquely equipped with the facilities and expertise necessary to ascertain reliably the drug's effects, or the comparative effects of two drugs, by controlling for the placebo effect and other spurious factors. (See discussion *supra* at pp. 18–24 concerning the requisites of meaningful scientific substantiation of claims that one analgesic is superior to another.) **[31]**

Under these circumstances, we find that when an advertiser has made unequivocal, unqualified claims about a drug product's effects, particularly in an intensive, long-running campaign,[51] consumers may be led to expect, quite reasonably, that the claims are supported by meaningful evidence, of the sort that would be likely to satisfy the relevant scientific community.[52] While some consumers may be skeptical, and treat all objectively verifiable representations in advertisements as mere expressions of the advertiser's opinion rather than as generally accepted facts upon which a rational purchasing decision may confidently be based, we doubt that advertising could long remain the powerful method of communication that it is were such an attitude common to the large majority of consumers.[53] In short, advertisements are an important source of decision-guiding information because many consumers assume that when advertisements make unqualified assertions of fact, those

[50] We note that in *Firestone* some of the claims directly involved the safety of the respondent's tires while others did not, and the Commission's order required cessation of any "safety or performance" claims unless "fully and completely substantiated by competent scientific tests." 81 F.T.C. at 475.

[51] See discussion *infra* at 58–60 concerning the evidence indicating that the extensive promotion of Anacin as a stronger, faster and otherwise better pain reliever has created a widespread belief in the product's superiority over other brands. See also *infra* at 48 for reference to the ALJ's findings on the extent of dissemination of the claims.

[52] In addition, consumers may reasonably believe that the marketing of therapeutic drugs is closely regulated by the government, and that scientific standards of substantiation are thereby imposed. See *Simeon Management Corp.*, 87 F.T.C. 1184, 1230 (1976), *aff'd*, 579 F.2d 1137 (9th Cir. 1978). We note that the same scheme of regulation to which both the Commission and the court referred in *Simeon* applies to the over-the-counter drugs at issue in the present case. See *supra* at 24, n.[36].

[53] Respondent conceded in its brief on appeal that consumers may infer from a "straight and unembellished comparative performance claim" that the advertiser's evidence "would be acceptable to responsible medical experts." R.A.B. at 35. Moreover, respondent's expert witness testified that consumers are likely to expect a higher level of support for claims about drug products than for claims about other products. Smith, Tr. 7586.

assertions are, indeed, not open to substantial question. *National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 197–98 (1976), *aff'd and ordered enforced as modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Sears, Roebuck & Co.*, Docket No. 9104 (April, 1980), slip op. p. 16, *appeal pending*, No. 80–7368 (9th Cir.).

Thus, AHP's advertising representations have a capacity to lead consumers to believe that the superiority of Anacin and APF has been established in the manner customarily **[32]**required by the scientific community.[54] And it follows that if such an unequivocal assertion is in fact open to substantial question—a matter to which we will turn in a moment—then the failure to disclose as much constitutes the misleading omission of a material fact.[55]

That the fact omitted is material, and its omission misleading, is evident from consideration of the difference in persuasive impact between the following two claims:

1. Anacin is more effective than aspirin in the relief of pain.
2. Although the matter is still open to question, we believe that Anacin is more effective than aspirin in the relief of pain. **[33]**

The first claim, like claims made in the advertising challenged here, assures the consumer that there is simply no question: Anacin is better than aspirin, and the consumer can thus rely, in purchasing Anacin, upon the fact he or she will be doing more thereby to relieve pain symptoms than were he or she to purchase plain aspirin. The second claim leaves the matter in some doubt: the advertiser certainly believes its product is better than aspirin, perhaps based on some evidence, but a prudent consumer could decide that inasmuch as the matter remains open to substantial question, he or she is better off buying aspirin, or buying neither product in the event the

[54] Advertisements having the capacity to deceive are deceptive within the meaning of the FTC Act; actual deception need not be shown. See, *e.g.*, *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *U.S. Retail Credit Ass'n* v. *FTC*, 300 F.2d 212, 221 (4th Cir. 1962); *Rhodes Pharmacal Co. Inc.* v. *FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955). It is well settled that the Commission has the expertise to determine whether advertisements have the capacity to mislead the public. Consumer testimony or survey data, although sometimes helpful, is not essential. *Resort Car Rental System, Inc.* v. *FTC*, 518 F.2d 962, 964 (9th Cir. 1965); see *FTC* v. *Colgate Palmolive*, 380 U.S. 374, 391–2 (1965).

[55] The conclusions set forth herein are merely an elaboration, in the specific context of drug products, upon well-established principles of advertising law requiring that advertisers possess and rely upon a reasonable basis for affirmative product claims. *Pfizer, Inc.*, 81 F.T.C. 23, 60–65 (1972). It has repeatedly been held that failure to possess a reasonable basis for advertising claims is a deceptive practice, *e.g.*, *Porter & Dietsch*, 90 F.T.C. 751, 866 (1978), *aff'd*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Jay Norris, Inc.*, 91 F.T.C. 751, 854 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *National Dynamics Corp.*, 82 F.T.C. 488, 550 n. 10 (1973), *aff'd in part and remanded in part on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974). Deception derives from the failure to disclose to consumers the material fact that an affirmative product claim lacks the support that would be presumed absent some qualification of it. The appropriate measure for such support is, of course, to be determined in light of the particular claims made and the products for which they are made. For reasons noted in the text, we believe that such support in the case of drugs consists of the two or more well-controlled clinical studies deemed necessary by a broad spectrum of relevant experts to justify assertions as to drug performance.

consumer has already decided that aspirin is not a suitable palliative. The first claim may make better copy, but the second claim comes much closer to the truth.

There is a substantial question, recognized by the qualified experts, about the superiority of Anacin and APF over aspirin and other OTC analgesics. The record demonstrates the relevant scientific community to be unanimous in its view that the superiority of one analgesic product over another (or a class of others) cannot be established unless more than one adequate, well-controlled clinical test has been conducted. See discussion *supra* at pp. 18–24. Thus, in the absence of such tests, there necessarily exists scientific doubt, characterized in the complaint as a "substantial question," about the validity of the claims.[56] **[34]**

We have already concluded that Anacin's superior efficacy for headache relief has not been demonstrated by the requisite tests. Moreover, additional evidence of doubt within the relevant scientific community is supplied by the unanimous testimony of complaint counsel's witnesses, who stated that Anacin's superior efficacy has *not* been established (Forrest, Tr. 465; Azarnoff, Tr. 611–12; DeKornfeld, Tr. 2788; Moertel, Tr. 959). Indeed, some of these witnesses testified to their belief that Anacin is in fact no better than aspirin (Forrest, Tr. 520; Moertel, Tr. 959). While some of respondent's witnesses said that they believe that Anacin *is* better than aspirin (*e.g.*, Lasagna, Tr. 4938; Okun, Tr. 4352), it is clear from the record that there are, overall, significant doubts in the scientific community.

Nor has APF been proven to the satisfaction of the scientific and medical community to cause less gastric discomfort than other analgesics.[57] Respondents base their claim on inferences drawn from the product's composition, arguing that the formulation of APF—486 mg. of micronized aspirin (aspirin with a smaller particle size) combined with "two recognized buffering agents" (both of which are

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[56] This reasoning, we note, parallels the approach of the Food and Drug Administration. When the FDA reviews OTC drug claims, it presumes a lack of general expert recognition of the validity of the claims if adequate controlled clinical tests have not been performed, and this approach has been upheld by the Supreme Court. In *Weinberger* v. *Hynson, Wescott & Dunning, Inc.* 412 U.S. 609, 629–32, (1973), the Court noted that the Federal Food, Drug and Cosmetic Act defines a new drug as one "not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective ***" 21 U.S.C. 321(p), but that the Act nowhere defines "general recognition among experts." The Court reasoned that "general recognition" of effectiveness must require at least "substantial evidence," which is required under Section 505(d) of the Act for approval of a new drug application (21 U.S.C. 355(d)). "Substantial evidence," as we discussed *supra* at pp. 20–24, must consist of adequate controlled clinical tests. (The Court also commented, in *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973), that whether a drug is a "new drug" depends on "the expert knowledge and expertise of scientists based on controlled clinical experimentation and backed by substantial support in scientific literature.")

[57] We have determined that AHP did not make a direct "establishment" claim with regard to APF (see *supra* at 15, n.[21]), but it did claim that APF causes less gastric discomfort than other analgesics. This claim is open to substantial question, as explained in the text.

antacids (RX 96B))—reduces the amount of gastric discomfort caused by its consumption (R.A.B. at 59).[58] **[35]**

While there is some testimony in the record that buffered aspirin may cause less gastric discomfort than regular aspirin (*e.g.*, Shapiro, Tr. 3041; CX 367Z100; see RX 96B),[59] even respondents' experts were not convinced that the use of buffers necessarily reduced gastric discomfort (*e.g.*, Lasagna, Tr. 4192–93). Complaint counsel's experts testified that substantial evidence that the addition of buffers results in less gastric discomfort does not exist (Sliwinski, Tr. 1149; Plotz, Tr. 1063; Grossman, Tr. 862; F. 383).[60] In fact, the American Medical Association's *Drug Evaluations* [61] states that the available evidence does not indicate that buffered aspirin is any better than ordinary aspirin (CX 362W). **[36]**

It is also open to question whether the substitution of microfine (micronized) aspirin for regular aspirin reduces the incidence of gastric discomfort. There is some evidence that micronized particles may be absorbed more quickly and thus cause less irritation (*e.g.*, RX 96B). Complaint counsel's experts testified, however, that it has not been established that microfine aspirin causes less gastric discomfort (Sliwinski, Tr. 1149; Plotz, Tr. 1061; F. 369). Indeed, Dr. Grossman stated that it is unlikely that microfine aspirin makes any difference at all (Grossman, Tr. 850–51). The fact that these medical experts did not agree that micronized aspirin reduced gastric discomfort demonstrates the existence of doubt in the medical community.

Thus, APF's claimed superiority in terms of gastric discomfort, like Anacin's purported superior efficacy for pain relief, has not been established, and is open to substantial question in the scientific community. Respondent has, then, advertised the superiority of its analgesic products without either demonstrating that superiority adequately or qualifying the claims by disclosure of the existence of a

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[58] The only study of APF in the record is one that compared its efficacy to that of buffered aspirin (CX 304). Since the only data from that study concerning gastric discomfort was generated incidentally, in the course of the efficacy comparisons (CX 304Z023; see Plotz, Tr. 1054), it is not sufficient to show APF's superior freedom from side effects. (See discussion *infra* at 43–44.) Respondent quite properly does not rely on CX 304 for substantiation of the freedom from gastric discomfort claim.

[59] RX 96 is a letter written by Dr. Arthur Grollman, a professor of experimental medicine at the University of Texas Medical School, reciting his views on the safety and efficacy of a drug formulated in the same manner as APF. The letter states Dr. Grollman's opinion that micronized particles are "less apt to cause gastric irritation" and that the antacids "give additional protection against gastric irritation" (RX 96A). This letter is evidence of only one physician's opinion as to the freedom from side effects of a drug like APF and it is refuted by complaint counsel's showing that APF's comparative freedom from gastric discomfort is open to substantial question in the scientific and medical community.

[60] Respondents quote the FDA panel report which concludes that buffered products "can be expected" to reduce gastric discomfort (R.A.B. at 60, quoting CX 367Z100). The panel report, however, speaks of only *some* of the persons who suffer gastric discomfort from consumption of regular aspirin, and goes on to conclude that "the evidence is insufficient to substantiate the claims that buffered * * * aspirin * * * is safe for use in patients who should not take regular * * * aspirin" (CX 367Z101).

[61] See *supra* at 28, n.[45].

substantial question. The advertisements in question are therefore deceptive within the meaning of Section 5 of the FTC Act.[62]

There remains for our consideration, however, respondents' contention that they were denied notice and a fair opportunity to be heard on the "substantial question theory" of liability. R.A.B. at 7–10. Respondent's argument appears to consist of three separate assertions. First, AHP contends that the "substantial question theory" pleaded in the complaint is a "novel theory," in that it challenges neither the truthfulness nor the lack of a "reasonable basis" for the claims made. R.A.B. at 8. But the fact that the "substantial question" phrasing used in this complaint may not have appeared in Commission cases previously would not constitute any violation of AHPs' rights. As we have explained, respondents' liability for their failure to disclose the existence of a substantial question rests on principles of deception in advertising that are established under Section 5. Respondents cite no legal authority for the proposition that a violation of due process may arise from an interpretation of the law which, although not previously articulated, flows directly from existing precedent. [37]

Indeed, it is settled that "there is . . . a very definite place for the case-by-case evolution of statutory standards," *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). The Supreme Court has specifically confirmed the Commission's authority to interpret Section 5 of the FTC Act in a case-by-case manner. See, *e.g.*, *FTC* v. *R.F. Keppel & Bros.*, 291 U.S. 304 (1934). A problem only arises if the retroactive effect of applying a new standard causes a detriment to the respondent which outweighs the need for administrative flexibility. *NLRB* v. *Bell Aerospace Co., supra*. That is not the case here, where respondent will only be required to cease deceptive advertising practices, and will not be subject to fines, damages, or other immediate penalties.

Second, AHP argues that this theory of liability is "vague." R.A.B. at 8. We take this to mean that respondents believe it was denied notice and an opportunity to defend itself on the allegation of failure to disclose the existence of a substantial question. We believe, however, that the issue this allegation raised—*i.e.*, the question of what level of substantiation the scientific community would require to support the validity of respondents' claims such that no substantial question would remain—was hardly one which AHP could not perceive from the complaint and progress of the proceedings. *NLRB*

[62] In light of this conclusion, we do not reach the question whether the advertisements are also unfair under Section 5.

v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 349–50 (1930); cf. *NLRB* v. *Johnson*, 322 F.2d 216, 219–20 (6th Cir. 1963).

The complaint charged, in Paragraph 13, that at the time respondents made the comparative claims alleged in Paragraph 12, "there existed a substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drug products, concerning the validity of such representations," and in Paragraph 14, that respondents failed to disclose the existence of a substantial question. In Paragraph 25, the complaint charged that this failure to disclose constituted an unfair or deceptive act or practice.

The pretrial proceedings made clear that to establish liability under this standard, complaint counsel would have to demonstrate the existence of a substantial question about the validity of the claims on the basis of the entire state of medical knowledge and opinion. Statement of Complaint Counsel on Certain Issues in Response to the Order of the Administrative Law Judge, filed July 27, 1973 ("Statement on Certain Issues") at 1–2; Pre-Trial Conference Transcript of Feb. 20, 1974, at 52, 64 (remarks of Judge Jackson), of Feb. 9, 1976, at 13–14 (remarks of Judge Hyun), and at 49 (remarks of Mr. Donegan). As complaint counsel repeatedly explained before trial, and as the ALJ confirmed, the issue of whether there is in the scientific community a substantial question [38]about a given proposition is a factual determination to be made on the basis of expert testimony and other evidence on the record. Statement on Certain Issues at 3; Pre-Trial Conference Transcript of March 4, 1976, at 74–6. Respondents were not deprived of an opportunity to rebut complaint counsel's showing of a substantial scientific question; indeed, the ALJ specifically announced at a Prehearing Conference, "I will allow both sides to put on evidence which conforms to any statement of their version of substantial question." Pre-Trial Conference Transcript of Feb. 20, 1974, at 48, 55–6. As we discussed above, the record ultimately demonstrated that the scientific community retains doubts about the validity of comparative analgesics claims if those claims have not been established by more than one adequate controlled clinical test, and that a substantial question did in fact exist as to Anacin's and APF's superiority.

Finally, respondents contend that the ALJ resolved this aspect of the case under the "reasonable basis" standard notwithstanding respondents' understanding throughout the trial that that was not the relevant legal standard. R.A.B. at 10. The ALJ, in applying the substantial question standard, stated that this standard "is, in the

particular factual context of this case, a reasonable and logical refinement of the 'reasonable basis' doctrine . . . ." I.D. at 210 (emphasis added). In our view, Judge Hyun was correct. The Commission's formulation of the substantial question allegations in this complaint constituted an assertion that a specific type of substantiation is required for the OTC analgesics claims challenged—*i.e.*, that the existence of a substantial question among the qualified scientists concerning these analgesic claims renders them deceptive, unless the existence of a substantial question is disclosed in the ads. Our reasoning in support of this interpretation of Section 5 is provided above. Respondents were on notice that this standard is not precisely the same as "reasonable basis," but is an extension of it, insofar as it requires that we look beyond the reasonableness of the supporting evidence in a respondent's possession when its claims were made, to the universe of relevant scientific knowledge and opinion.

For all the foregoing reasons we find unpersuasive respondents' assertions of a denial of due process arising from the application of the substantial question standard of liability.

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In sum, we have examined two categories of comparative efficacy and side effects claims made by respondents, and found each to be deceptive under the appropriate legal standard. The first category of claims, covered by Paragraphs 10 and 11 of the complaint (and discussed in Part B above), consists of direct representations that the superiority of AHP's drug products has been *proven*. Where those claims are made, they must, based on the testimony in this case (and consistent with FDA's standards), find support in more than one adequate clinical test. We found further that AHP failed to meet this standard here, and that its claims of proof were therefore false and deceptive. **[39]**

Advertising claims in the second category, covered by Paragraphs 12, 13 and 14 of the complaint (and discussed in Part C above), represent that AHP's products are better than its competitors', but do not rely on affirmative indicia of "proof." We have held that in the context of drug products, consumers may reasonably expect such claims to be supported by evidence sufficient to satisfy the scientific community, which this record shows to be more than one adequate clinical test. Because respondents' claims were neither supported by the requisite evidence nor accompanied by a disclosure of the absence of proof or existence of doubt, we found them to be deceptive.

III. *Other Alleged Claims*

A. Tension relief

Respondents are alleged to have claimed in numerous advertisements "that a recommended dose of Anacin relieves nervousness, tension, stress, fatigue and depression and will enable persons to cope with the ordinary stresses of everyday life" (Comp. ¶ 15). AHP argues that the advertisements at issue promised relief from tension and related mood effects only when those effects are caused by headache pain (R.A.B. at 40–41).

We agree with the ALJ that many of respondents' advertisements convey the message that Anacin is not only a pain reliever, but is also independently effective for relief of tension, nervousness, and stress. F.F. 156–170; I.D. at 170–72. These advertisements emphasize the "mood" effects that could be achieved by taking Anacin, and give far less attention to the secondary message that Anacin relieves headache pain.

One scene repeatedly depicted, for example, is a household situation in which one family member, feeling tense or pressured by some minor irritation, takes Anacin, with the result that the irritation is removed and harmony in the home restored. See, *e.g.*, CX 39–46. See also the "Housewife Headache" series of print ads, CX 92–95, stressing the "nervous tension and fatigue" that can result from housework ("a mild form of torture"). Another variation on this theme is CX–160, a radio ad in which the announcer, against a background that includes a baby crying and a dog barking, cites "fatigue" (twice), "stress" (twice), "nerves" (twice), "tension" and "headache pain," concluding, "Yes, there can be more to a headache than just pain."

Other advertisements are based on the tension associated with stressful jobs. For example, CX 31A shows a bank teller handling a long line of customers on payday, the teller's tension headache dissolving into a smile after Anacin is taken. In still other ads we see an individual in a hurry (CX 22A) or pressured by a variety of burdensome tasks (CX 8A), and witness the tension "relaxed" by Anacin (as it relieves pain, we are told). **[40]**

Another technique used to create a sense of tension is to remind viewers of typically stressful situations that they might have encountered in the past. For example, one advertisement shows a man anxiously waiting in an employment office (CX 38); another shows a young couple looking for an apartment (CX 26). In the apartment advertisement, the tension is depicted by outward signs of stress on the part of the young woman: in one frame she is biting her

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lip, in another she appears to be biting her nails. After Anacin is taken, the couple finds an apartment, and the tension is relieved.

The ASI copy test for this commercial (CX 418) shows that "tension/nervous tension" was the symptom most often identified by viewers. Twenty-two percent identified tension/nervous tension as a symptom relieved by Anacin, while only three percent named "tension headache" (CX 418J). Dr. Ross pointed out that relief by Anacin of tension *per se* was perceived by more consumers than relief of a tension-caused headache (Ross, Tr. 1997). Indeed, Dr. Ross testified that in viewing these Anacin advertisements, particularly the family scenes, the consumer perceives that "the dominant benefit that is being promised by Anacin is the relief of fatigue, stress and nerves, not dominantly pain or headache" (Ross, Tr. 1953). Referring to CX 26 (apartment commercial), Dr. Ross stated that the primary theme of the advertisement is that nerves and stress (rather than pain) are relieved by Anacin (Ross, Tr. 1995). Dr. Ross also testified that the print advertisements (*e.g.*, CX 89) were devoid of references to pain and that the headache to be relieved by Anacin ("Housewife's Headache") was characterized as being composed of tension and fatigue, not of pain (Tr. 2004–05).

These ads, considered in their totality, convey a strong message that Anacin relieves anxiety, stress and other mood problems entirely apart from its function as a pain reliever.

Having found that respondents' advertisements made the tension relief claims as alleged, we must consider whether respondents had a reasonable basis for making such claims.[63] AHP argues only [41]that it had a reasonable basis for its claim "that Anacin will relieve *tension-associated pain*," (R.A.B. at 59 (emphasis added)). This is essentially a repetition of its argument that the Anacin advertisements made representations only about tension caused by headache pain, an argument which we have already rejected. Respondents do not claim to have had a reasonable basis for the representations that Anacin will relieve tension and stress apart from its pain-relieving properties. The record is clear and uncontradicted that Anacin does not possess such properties (DeMott, Tr. 4765; Rickels, Tr. 1236–37; F.F. 343–57).

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[63] As to this noncomparative claim, the complaint charged respondents with lack of a reasonable basis, "in that respondent had no competent and reliable scientific evidence to support such representations" (Comp. ¶ 16), rather than failure to disclose the existence of a substantial question. The Commission is aware that the application of these two different standards (see *supra* at 38 for discussion of the difference) to noncomparative and comparative advertising claims could create an appearance that comparative claims will be burdened hereafter by more stringent substantiation requirements, and that comparisons—which when truthful and nondeceptive may be useful to consumers—will be thereby disadvantaged. The Commission does not intend any such result, nor does it believe such a result necessarily flows from this case. We note that the FDA statute and regulations discussed earlier directly apply the "substantial evidence" standard to noncomparative claims on OTC drug labels (and to noncomparative and comparative claims in prescription drug labeling and advertising).

B. Relief in 22 Seconds

The complaint (¶8(A)(4)) also alleged that AHP's advertising represented "that within approximately 22 seconds after taking Anacin a person may expect relief from headache pain." Unlike the ALJ, we find it improbable that consumers would believe, based on the advertisements in the record, that Anacin can relieve headache pain only 22 seconds after it is taken. The print advertisements (CX 142–44, 151, 153) all stated that Anacin would provide relief 22 seconds "after entering your bloodstream," not after it is taken. Moreover, the one television ad that used this theme (CX 1) specifically qualified the 22-second claim with the comment, "[w]hile you won't feel it for minutes * * * ." Therefore, we do not adopt F.F. 148–55.

C. Survey Claims

Paragraph 20 of the complaint alleges, and the ALJ found, that AHP's advertisements also contained claims representing that physicians or specialists prefer and recommend Anacin more than other OTC analgesics, as demonstrated by surveys. See F.F. 109–12. The ALJ found that the mail survey on which these representations were based was inadequate to substantiate them. Respondent has not appealed these findings. We agree with the ALJ that the claims were made and that there was no adequate basis for them, in light of the response rate in the survey of only 10%. See F. 393.

IV. *Liability of C. T. Clyne Company*[64]

The ALJ concluded that respondent Clyne, AHP's advertising agency for APF, was liable for the false claim that APF's analgesic ingredient is unusual or special, but not for the claim that it is established by medical or scientific proof that APF causes less gastric discomfort than other OTC internal analgesics (I.D. at 224). The ALJ's order thus requires that Clyne cease and desist from representing, with respect to any OTC internal analgesics, that such products contain any ingredient or combination of ingredients that is unusual or special, when that ingredient or combination of ingredients is contained in other OTC analgesics. [42]

Complaint counsel appeal from the limitation of Clyne's liability to the ingredient content claim and assert that Clyne should be held liable for the gastric discomfort comparative claim as well (C.C.A.B.

[64] The C. T. Clyne Company, Inc. is the corporate successor to Clyne Maxon, Inc., the advertising agency named in the complaint (CX 610B (Stip. 1)).

at 26). They argue that the order should be expanded to apply to Clyne requirements for comparative efficacy claims comparable to those applied to AHP (C.C.A.B. at 40). Respondent Clyne does not appeal directly from the findings of the ALJ, although in its answering brief it contends that it is entitled to a clause in the order precluding liability unless Clyne knew or had reason to know that the representations at issue were false or deceptive (Clyne Ans. Br. at 26–27), and a clause that expressly provides that Clyne is permitted to rely on its client for any substantiation required by the order (Clyne Ans. Br. at 27).

The liability of advertising agencies for violations of Section 5 is governed by two general principles. First, in order for the agency to be held liable, it must have been an active participant in the preparation of the advertisements at issue. *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921, 927 (6th Cir. 1968); *Carter Products, Inc.* v. *FTC*, 323 F.2d 523, 534 (5th Cir. 1963); *ITT Continental Baking Co., Inc.*, 83 F.T.C. 865, 967 (1973), *aff'd and modified*, 532 F.2d 207 (2d Cir. 1976). Second, it must have known or have had reason to know that the advertisements were false or deceptive. *Doherty, supra*, 392 F.2d at 927; *Standard Oil Co.* 84 F.T.C. 1401, 1475 (1974); *aff'd and modified*, 577 F.2d 653 (9th Cir. 1978).[65]

The record demonstrates that Clyne was a sufficiently active participant in the creation of the Arthritis Pain Formula advertisements at issue[66] to satisfy the first criterion for advertising agency liability (Ans. of Clyne, ¶ 4; CX 610B (Stip. 3, 5, 6); CX 611Z165; F.9, 467 (I.D. at 9, 116)).[67] It is evident, moreover, that Clyne was aware of both the aspirin content of APF (Noncontested Facts ¶ 13) and the fact that aspirin is available in many OTC drug products (Noncontested Facts ¶ 14). Clyne, therefore, not only had reason to know that APF's analgesic ingredient was not unusual, but the ALJ correctly found that Clyne actually knew that the unusualness representations were false (I.D. at 224). We sustain the ALJ's finding of Clyne's liability for these claims. **[43]**

We have found that the claim that it is established that APF causes less gastric discomfort than other internal OTC analgesics was not made by means of the same techniques conveying proof that AHP used for Anacin (*supra* at 15, n.[21]). We have also found,

[65] Although as we discuss *infra* complaint counsel have affirmatively established that Clyne knew or should have known that the ads were deceptive, we note that it has been held that the burden of proof rests in the first instance on the advertising agency: "An agency is clearly liable for the advertising it has created, produced or assisted in producing unless it can be shown that it did not know or could not know that the challenged advertising was false." *ITT Continental, supra*, 83 F.T.C. at 968.

[66] The only allegations in the complaint relating to Clyne are those that deal with the advertising of Arthritis Pain Formula (*e.g.*, Comp. ¶¶ 4, 8B, 9B, 10B, 12B and 22).

[67] Moreover, Clyne's active participation is undisputed on appeal.

however, that AHP and Clyne did make the unqualified claim that APF will cause gastric discomfort less frequently than other internal OTC analgesics, without disclosing that this claim is open to substantial question in the medical community. We must therefore decide whether Clyne knew or had reason to know that this unqualified claim was deceptive.

Clyne argues that an advertising agency has no responsibility to conduct an independent examination of the relevant scientific evidence before participating in the creation of its clients' advertising programs (Clyne Ans. Br. at 4–5). Nevertheless, under the circumstances presented, Clyne should have inquired further than it did into the state of the medical evidence supporting the comparative efficacy claim.

Clyne admits that the only evidence it had before it that the claim was true was CX 304, a study conducted by the research division of AHP (CX 611Z144), and that no experts other than those employed by AHP were consulted (CX 611Z169). CX 304 (entitled "Arthritis Pain Formula Evaluation") consists of a study conducted by AHP to compare the efficacy of APF and buffered aspirin for relief of the symptoms of arthritis. Although the purpose of the study was not to compare the gastric effects of the two formulations, and data on such effects were gathered only incidentally, the study concluded that "[i]t was established that Arthritis Pain Formula demonstrated significantly less evidence of gastrointestinal irritation and bleeding than did the buffered aspirin formula" (CX 304S).[68]

The ALJ found that Clyne's reliance on the AHP study was not unreasonable, and that a contrary finding would impose a duty on the advertising agency, unwarranted by the facts of the case, to conduct an independent investigation of its clients' substantiation for their claims (I.D. 224–25).

An advertising agency may, of course, rely on a *reliable* study provided by its client to substantiate advertising claims. If a study is on its face defective, however, such reliance cannot be considered reasonable. The APF evaluation here at issue is so clearly inadequate to support the claim that APF's freedom from gastric discomfort is superior to that of other analgesics that Clyne cannot be said to have been reasonable in its reliance. [44]

It should have been clear, even to the untrained eye, that the data on gastric discomfort generated by the study were collateral to its main purposes. A glance at the study's protocol (which was provided

[68] Complaint counsel point out that "gastrointestinal irritation" is not necessarily the same as "gastric discomfort" (C.C.A.B. at 29 n. 73). That proposition, however, is not self-evident, and Clyne's assumption that the two terms were synonymous is understandable. We agree with the ALJ that "Clyne should not be faulted for having equated 'gastrointestinal irritation' with 'stomach discomfort'" (I.D. 224).

to Clyne along with the study (CX 304A021–27)) demonstrates that only those side effects that happened to be volunteered by the patients were to be recorded (CX 304Z023). The data tables show that very few patients did volunteer that information (CX 304Z019). Such uncorroborated data are patently insufficient to prove scientifically APF's relative freedom from gastric discomfort. Thus, it should have been obvious to Clyne that there was a disparity between the type of substantiation provided and the unqualified representations made for the superiority claim. Under these circumstances, Clyne should have inquired further into AHP's substantiation.

We hold, then, that Clyne could not have reasonably relied on the AHP study as support for the claim that APF's freedom from gastric discomfort is superior to that of other internal OTC analgesics, and that Clyne is therefore liable for the deception caused by the claim.[69] This holding does not, as Clyne suggests, burden advertising agencies with a duty to conduct independent scientific investigations in order to substantiate their clients' claims (Clyne Ans. Br. at 5). Clyne could easily have fulfilled its responsibility here by insisting that its client provide further substantiation or by disclosing the lack of proof or existence of a substantial question. We hold only that when presented with a facially inadequate study as substantiation, an advertising agency may not ignore the study's defects. **[45]**

V. *Relief*

A. Overview

The attached order encompasses the acts and practices of respondents which we have found to violate Sections 5 and 12, as described in the foregoing discussion, and, where we believe it to be necessary, circumscribes potential closely-related violations under the Commission's well-established authority to close off all avenues to prohibited conduct. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). See also *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 468 (1972), *aff'd* 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); *Carter Products, Inc.* v. *FTC*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

The order diverges in several important respects from that proposed by the ALJ (described above at p. 3). For example, the ALJ's order would have applied a clinical testing requirement to

[69] For the sake of clarity we have included a "know or reason to know" clause in Part V.A of the order. Although such a clause is not required (*ITT Continental Baking Co.* v. *FTC*, *supra*, 532 F.2d at 224), complaint counsel do not object to its inclusion (C.C.A.B. at 31 n. 78). In part V.B, we have included "know or reason to believe," because we can assume that Clyne does not itself have the expertise to evaluate thoroughly the validity of these studies, and must to a certain extent rely on its client for expert evaluation.

advertising by respondent of any OTC drug, whereas the attached order applies such requirements only to advertisements for OTC internal analgesic drugs, for reasons to be explained below. Under this order, in all such advertisements, AHP must cease any claim of proven superior effectiveness or proven superior freedom from side effects unless the claim is proven by adequate clinical studies, and cease any other claim of superior effectiveness or superior freedom from side effects unless it is either proven by adequate clinical studies or qualified by disclosure of the existence of a substantial question or the absence of scientific proof.

In addition, the attached order requires that along with ceasing false "unusual ingredient" claims for any OTC drug, AHP must disclose the presence of aspirin in any Anacin or APF ad making any performance claim. We have deleted the provision in the ALJ's order requiring disclosure of the presence of aspirin in any advertisement for an OTC drug containing aspirin.

Under our order AHP must also cease misrepresentations of test or survey results, and false representations about the quantity of any active ingredient in comparison to the quantity in competing products. Finally, AHP is ordered to cease tension relief claims for Anacin, and other non-comparative claims for Anacin, APF, or any other OTC drug product for which a reasonable basis, consisting of reliable scientific evidence, is lacking. [46]

Respondent C.T. Clyne is ordered to cease unusualness claims for APF and other OTC analgesics which it knows or has reason to know are false, and with respect to claims of comparative freedom from side effects of APF or other OTC analgesics, Clyne must either know or have reason to believe that a product's superiority has been established, or make the necessary disclosure. The latter provision was not imposed under the ALJ's order.

We find it unnecessary to order corrective advertising to remedy previous claims of Anacin's superior efficacy. In addition, we reverse the ALJ and decline to order a corrective remedy for the tension relief claims. Finally, our order, unlike the ALJ's, does not cover labeling, but is limited to advertising claims.

B. Comparative Efficacy and Side Effects Claims

Under Part I.A. of the order, claims by AHP representing that the superior effectiveness or freedom from side effects of any OTC internal analgesic has been proven are prohibited unless they are supported by at least two adequate well-controlled clinical studies. The criteria shown by the record to be necessary to ensure that the clinical studies are adequate and well-controlled are set forth in the

order. Advertisements will trigger this testing requirement if they expressly claim that the product's superiority is proven or established; refer to medical or scientific research, tests or reports; or imply the existence of scientific or medical support through any of the sorts of techniques AHP has used, including references to or visual depiction of scientific graphs, formulas or diagrams, or a scientific or medical setting, conveyed *e.g.*, by the use of medical reference texts. See discussion *supra* at 15–18.

Part I.B. of the order provides that any other comparative claim by AHP for an OTC analgesic must be either supported by the same type of clinical testing set forth in Part I.A., or qualified by a disclosure that the claim has not been proven or that there is a substantial question about its validity.[70] A similar provision applies to analgesic advertising by Clyne, under Part V. As we have said, this record shows that any comparative analgesic claim not supported by adequate clinical tests cannot be considered to have been proven, and is necessarily open to a substantial question. We have also explained why the Commission believes that when such proof is lacking, it is deceptive to make a superiority [47]claim unless the existence of a substantial question or the absence of proof is disclosed.[71]

If respondents' advertising triggers the disclosure provision of Part I.B, the necessary disclosure must be made clearly and conspicuously in the ads. To eliminate uncertainty on respondents' part, the order permits them to use one of the forms of disclosure specified in the order itself.[72] In the alternative, they may design a disclosure of their own choosing. If respondents use language other than that specified in the order, they must maintain records that will be adequate to demonstrate that the required message will be or has been effectively conveyed to the advertisement's intended audience. Such records may consist of the copy tests performed in the routine course of respondents' business.

These provisions of the order apply to advertising of Anacin and

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[70] False claims about the comparative quantity of analgesic or other active ingredients in respondent's OTC drug products are specifically prohibited under Part II.B.

[71] Affirmative disclosure requirements have been included in Commission cease and desist orders on numerous occasions where advertisements would otherwise be misleading (*e.g.*, *National Comm'n on Egg Nutrition*, 88 F.T.C. 89 (1976), *aff'd and ordered enforced as modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Keele Hair & Scalp Specialists, Inc.*, 55 F.T.C. 1840 (1959), *aff'd*, 275 F.2d 18 (5th Cir. 1960), and the Commission's authority to order such disclosures is no longer open to question. *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 759 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

[72] The disclosures specified are that the claim is "open to substantial question" or that the claim "has not been proven." Because this language constitutes precisely that message necessary to remedy what we have found to be otherwise misleading superiority claims, we have included it, rather than language proposed by complaint counsel, in the order. Complaint counsel proposed a disclosure that "it is not known whether . . ." or that "there is a real question whether . . . ." C.C.A.B. at 23. If those or other forms of disclosure can be shown to convey the required message, they would of course be acceptable under Part I.B.2.

APF, and of any other OTC internal analgesic product as well. While the case law makes clear that we are not required to restrict our order to the particular products at issue,[73] we [48]believe that some discussion of this issue is appropriate in light of the judicial modification of an earlier order against AHP. *American Home Products Corp*, v. *FTC*, 402 F.2d 232 (6th Cir. 1968).[74] As summarized recently in *Sears Roebuck & Co.*, Docket No. 9104 (April 28, 1980), slip op. p. 11, *appeal pending* No. 80–7368 (9th Cir.), "The appropriate scope of an order necessarily depends upon a rough evaluation of the extent to which a practice is likely to be repeated", as measured by factors including the transferability of the practice to other contexts, extent of the violation, state of mind of respondent, and past history of respondent.

Respondent could, with no difficulty, make unsubstantiated and unqualified assertions of superiority in advertising for other analgesic products as it has done in its promotion of Anacin and APF.[75] We turn, then, to consideration of those factors indicating whether AHP is likely to do so.

The advertising challenged in this proceeding was widely disseminated, in print and broadcast media, over a period of many years and at a cost of millions of dollars annually. F.F. 4, 5, 585, 586.[76] A reading of those advertisements demonstrates that respondent consistently made the deceptive claims. Moreover, as we stated in a previous opinion, "respondent is hardly a stranger to Commission proceedings." *American Home Products Corp.*, 70 F.T.C. 1524, 1625 (1966). This case represents the fourth time that we have entered a litigated cease and desist order against respondent on the basis of misleading advertising [49]claims for OTC drug products.[77] As we

[73] See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394–5 (1965); *Jay Norris* v. *FTC*, 598 F.2d 1244, 1250 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *ITT Continental Baking Co*, v. *FTC*, 532 F.2d 207 (2d Cir. 1976); *Sears Roebuck Co.*, Docket 9104 (April 28, 1980), appeal docketed No. 80–7368 (9th Cir.). Other court decisions sustaining Commission orders prohibiting specified deceptions as to a category of products, based upon findings of deception in the sale of one product, include *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (order prohibiting unsubstantiated efficacy claims for any "food, drug, cosmetic, or device" sustained on basis of findings that efficacy of one product was misrepresented); *National Dynamics Corp.* v. *FTC*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974) (order prohibiting certain unsubstantiated performance claims for *all* products sustained on basis of findings of deceptive advertising for one product).

[74] That case involved a hemorrhoid treatment product ("Preparation H") and the original order would have prohibited respondent from misrepresenting the efficacy of any drug. The court limited the order to the specific product at issue.

[75] This situation thus differs from that in *Standard Oil Co. of Calif.* v. *FTC*, 577 F.2d 653 (9th Cir. 1978), where the court found that "the petitioners' violations involved use of a visual image which was misleading because of the specific subject matter of the advertising. The violations were not a technique of deception that easily could be transferred to an advertising campaign for some other product." 577 F.2d at 663.

[76] In *FTC* v. *Colgate-Palmolive Co.*, *supra*, three commercials were found sufficient to support an "all products" order; in *ITT Continental Baking Co., Inc.* v. *FTC*, *supra*, "numerous advertisements comprising two large campaigns over a number of years" were found to support an order relating to growth properties of any food product.

[77] Our previous orders concerned: false representations of the drug "Freezone" to remove corns by respondent's wholly-owned subsidiary, *Wyeth Chemical Co.*, 29 F.T.C. 281 (1939); misrepresentations concerning

(Continued)

have stated, those previous Commission proceedings all concerned "the making of misleading exaggerations and misstatements in advertisements with respect to the efficacy of the drugs which [it] was selling." 70 F.T.C. 1524, 1625. There is simply no room left to doubt that respondent is "a habitual violator of the Federal Trade Commission Act," *American Home Products Corp.* v. *FTC*, *supra*, 402 F.2d at 237,[78] and that in order to protect the public adequately against future deception of the same sort, these provisions of our order must cover claims for more than the two products misrepresented.

We have, however, extended this section of the order only to OTC internal analgesics rather than all OTC drugs as the ALJ proposed,[79] in recognition of the possibility that comparative claims for other OTC drug products may be adequately substantiated, at least in some instances, by evidence other than two clinical tests meeting the criteria outlined above. Respondent has argued that a single standard of proof is inappropriate for assessing the comparative efficacy of different types of drugs. Resp. Reply Br. at 20–23. **[50]**

The record establishes that the standard requiring at least two tests, with placebo controls, is required for substantiation of analgesics claims, due to the likelihood that a subject's expectations will influence a subjective response like pain relief. But while the requirement for two such studies to support OTC drug claims in general has been widely accepted, we note that the FDA regulation for new drug approvals, which is expressly based on this standard, does provide that the testing criteria may be waived in whole or in part where a waiver petition demonstrates that "some or all of the criteria are not reasonably applicable to the investigation and that alternative procedures can be, or have been, followed, the results of which will or have yielded [sic] data that can and should be accepted

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"Outgro" for restoring ingrown toenails, *American Home Products Corp.*, 63 F.T.C. 933 (1963); and misrepresentations about its hemorrhoid treatment product "Preparation H." *American Home Products Corp.*, 70 F.T.C. 1524 (1966).

[78] We also take notice of the fact that respondent has elsewhere been found to have made false and misleading representations concerning the properties of Anacin and "Maximum Strength Anacin." *American Home Products Corp.* v. *Johnson and Johnson*, 436 F. Supp. 785, 803 (S.D.N.Y. 1977), *aff'd*, 577 F.2d 160 (2d Cir. 1978) (representations concerning superiority of Anacin to Tylenol generally and for inflammation); *McNeilab, Inc.* v. *American Home Products Corp.*, 79 Civ. 3973 (S.D.N.Y., filed July 21, 1980) (representations that Maximum Strength Anacin is a stronger analgesic than Extra Strength Tylenol, and has the maximum strength allowed without a prescription).

[79] The ALJ subsequently stated in his decision in *Bristol-Myers Co.*, Docket No. 8917 (Sept. 18, 1979), that he has modified his views concerning the scope of this provision (see Initial Decision in that proceeding, at 254–55), and he would presumably agree with the product coverage of our order. In light of our resolution of this issue, we deny AHP's motion of Feb. 13, 1981 for remand and reopening of proceedings, which respondent bases on the ALJ's proposed orders in *Bristol-Myers* and in *Sterling Drug*, Docket 8919.

as substantial evidence of the drug's effectiveness." 21 C.F.R. 314.111 (a)(5)(ii)(a).[80] Therefore, although complaint counsel assert that this waiver has been applied to date by FDA's advisory panels only in "extremely unusual instances," none of which involved comparative drug claims (C.C.A.B. at 71–3), we cannot assume that a similar allowance for exceptions would be unwarranted for comparative OTC drug claims far afield from the scope of this litigation.[81]

AHP argues, however, that the testing standard applied by the ALJ violates its First Amendment rights. Relying on political speech cases, it contends that the requirement of two well-controlled clinical studies for comparative claims is an impermissible prior restraint, and that the alternative offered (disclosing that the representations made have not been proven) is similarly prohibited. R.A.B. at 19. Respondent also claims that the order provision infringes the First Amendment by chilling "truthful" comparative claims because of the expense of substantiating such claims. We find these arguments to be without merit. **[51]**

The order provision challenged by respondent does no more than prohibit advertising that is deceptive, by stating or implying that the superiority of respondent's analgesic products has been established by scientific or medical evidence, without disclosing the absence of scientific proof, or the existence of substantial scientific doubt. As the Supreme Court has only recently reiterated, there is no constitutional protection for deceptive advertising:

> There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . . .

Central Hudson Gas & Electric Corp. v. *Public Service Comm'n*, 100 S. Ct. 2343, 2346 (1980).[82]

Where deceptive advertising occurs, the First Amendment does not prevent the imposition of such relief as is needed to prevent recurrence of the deception, *National Soc. of Professional Engineers* v. *United States*, 435 U.S. 679, 697–98 (1978); and the specific remedial requirement that advertising be substantiated has been judicially sustained in the face of First Amendment challenge, *Jay*

[80] See also 21 C.F.R. 330.10(a)(4)(ii), which incorporates the waiver provision quoted above in establishing procedures for FDA advisory review panels to follow in classifying OTC drugs as safe and effective and in promulgating monographs specifying conditions of use for each category of drugs.

[81] If in the future respondent discovers changed conditions of law or fact which would dictate that even comparative analgesic claims be subject to requirements different from those in this order, it is of course free to file a request for modification of the order under the Commission's Rules of Practice.

[82] Other cases establishing this point include, *e.g.*, *Friedman* v. *Rogers*, 440 U.S. 1, 13, 15–16 (1979); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383–4 (1977); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771–2, n. 24 (1976).

Norris Corp. v. *FTC*, 598 F.2d 1244, 1252 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

In *Jay Norris*, as here, respondent argued that an order (much broader than here) requiring that certain claims be substantiated would chill advertising. As the Commission noted, however, a substantiation requirement fosters rather than impairs First Amendment objectives, because substantiation by an advertiser is the only way to insure that claims are reliable. *Jay Norris Corp.*, 91 F.T.C. 751, 851–855 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).[83] Moreover, the dissemination of advertising claims for which the advertiser lacks appropriate **[52]**support is itself a deceptive practice[84] and prohibition of such claims amounts, therefore, to no more than a constitutionally unobjectionable ban on deceptive advertising.

AHP argues more particularly that even if a requirement of prior substantiation is appropriate, the requirement that AHP possess at least two clinical tests in support of analgesic efficacy claims is overly restrictive. The order, however, does not prevent AHP from suggesting that its analgesic products possess certain properties, even absent two clinical tests, provided that AHP reveals that its claim remains open to question.[85] Given that the record shows that at least two clinical tests are required to establish claims of analgesic efficacy, any attempt to make an unequivocal claim of efficacy without that level of support would clearly be misleading. The testing requirement, therefore, constitutes a necessary and proper restraint on the precise type of misleading advertising that gave rise to this case.

C. Ingredient Claims and Omissions

We have described above, at pp. 5–8, the ways in which respondents conveyed a false representation of the unusualness or specialness of the analgesic ingredient in Anacin and APF. The

[83] The requirement that advertisements be substantiated has been repeatedly sustained. See, *e.g.*, *Porter & Dietsch, Inc.*, 90 F.T.C. 770 (1977), *aff'd* 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Fedders Corp.*, 85 F.T.C. 38, 69 (1975), *aff'd*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 475 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973). We note that in *Central Hudson, supra*, the Supreme Court reaffirmed a major premise underlying the requirements of advertising substantiation when it stated that one reason the content of commercial speech may be regulated is that "commerical speakers have extensive knowledge of both the market and their products. Thus, they are well-situated to evaluate the accuracy of their messages . . . ." 100 S. Ct. at 2350, n. 6.

[84] *E.g.*, *National Comm'n on Egg Nutrition*, 88 F.T.C. 84, 191 (1976), *aff'd and ordered enforced as modified*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *National Dynamics Corp.*, 83 F.T.C. 488, 549–550 (1973), *remanded in part on other grounds*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974).

[85] Requirements that commercial messages include "additional information, warnings and disclaimers" have been recognized as permissible under the First Amendment as a means of preventing deception. *Virginia State Bd. of Pharmacy, supra*, at 772, n. 24. See also, *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 769–70 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

advertisements emphasized the purported difference between AHP's aspirin-based competitors and its own products, associating the competitors with aspirin but never identifying the analgesic ingredient in AHP's own products as aspirin. Under Part II.A of the order, the misleading affirmative claims may not henceforth be made by AHP in any OTC drug advertising when the ingredient represented as special is in fact commonly used in other products intended for the same purpose.[86] Under Part V, Clyne may not make such claims in any analgesic advertising when it has reason to know of the falsity of the claim. **[53]**

We believe it essential that Part II.A encompass all OTC drug advertising by AHP, and bar misrepresentations of the specialness of common ingredients other than aspirin. The effort to misrepresent the nature of a quite ordinary ingredient—whether it is aspirin, caffeine, or some other substance[87]—is a technique that could easily be applied to advertising of OTC drug products other than Anacin or APF. And as we have described above in detail, this respondent's history of misleading advertising raises a serious concern that the order imposed here be carefully drawn if it is to succeed in preventing future violations.[88]

In addition, Part III of the order requires that in Anacin and APF ads[89] making any performance claims (such as strength, ability to relieve pain, or freedom from side effects), the analgesic ingredient must be clearly and conspicuously disclosed **[54]**as aspirin (when it is aspirin). Part III will ensure that all Anacin and APF ads, save those that merely identify the product without any representation about performance, will reveal the analgesic ingredient to be aspirin; thus, advertisements for the two specific products which this record shows to have been promoted heavily by misleading statement and omission about their analgesic content will no longer create an erroneous impression that the ingredient is something different from and better than aspirin. Without this specific aspirin disclosure requirement, we are concerned that this respondent—with its

[86] Of course, a claim of the unusualness or specialness of an ingredient is likely also to convey a claim of superior effectiveness (or freedom from side effects), and thus be subject to the requirements of Parts I.A, I.B and V.B.

[87] Caffeine, like aspirin, is a common substance available in many products (F. 387; Ans of AHP, ¶ 23). Thus, if caffeine is commonly used in products intended for the same purpose as the advertised product (as aspirin is used in many products intended for pain relief other than Anacin), the advertisement may not state or imply that it is an unusual or special ingredient. The fact that the ALJ found that caffeine has not been shown to pose a serious public health problem is irrelevant, since the basis for this disclosure requirement is the need to prevent misleading representations about the ingredient.

[88] Because the advertising agency does not bring to this litigation the same history of advertising violations as AHP, we believe that an order covering only OTC internal analgesics will suffice as to Clyne. Nor does the order require Clyne to make affirmative ingredient disclosures.

[89] The order also covers advertisements for any product that includes "Anacin" or "Arthritis Pain Formula" in its name, such as "Maximum Strength Anacin."

striking history of related advertising violations—will devise ways to continue misrepresenting the nature of its product.

D. Tests and Surveys

Part II.C of the order prohibits respondent from misrepresenting any test, study or survey or the results thereof, concerning the efficacy or freedom from side effects of its OTC drug products. In light of the findings that respondent made misleading representations involving tests comparing Anacin with other analgesics (see *supra* at 15–17), as well as a survey of doctors (see *supra* at 41), a prohibition on future misrepresentations of this sort is necessary. Such a prohibition is particularly warranted in light of the order's other provisions requiring tests to substantiate certain claims, to ensure that any tests performed thereunder will not form the basis for further misrepresentations. We are limiting this provision, however, to conform to the types of misrepresentations that respondent made: namely, efficacy and freedom from side effects claims. See *Fedders Corp.*, 85 F.T.C. 38, 74 (1975), *aff'd*, 529 F.2d 1398, 1403 (2d Cir.), *cert. denied,* 429 U.S. 818 (1976).

E. Tension Relief and Other Unsubstantiated Noncomparative Claims

Respondent argues that a cease-and-desist order relating to its unsubstantiated tension relief claims is unwarranted because such claims were abandoned in 1973. It is well established that the Commission has authority to enter an order even where the challenged practices have been voluntarily **[55]**abandoned or revised. See, *e.g.*, *American Medical Ass'n* v. *FTC*, 1980–2 (CCH) TRADE CAS. ¶ 63,569 at 77,028 (2d Cir.) (1980); *Giant Food Inc.* v. *FTC*, 322 F.2d 977 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 967 (1964); *Fedders Corp.* v. *FTC*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Here, moreover, respondent ceased its tension relief advertising only after the complaint was issued. As the court stated in *Oregon-Washington Plywood Co.* v. *FTC*, 194 F.2d 48, 50 (9th Cir. 1952), "Parties who have abandoned their challenged practices only after proceedings are brought against them are in no position to complain of a cease-and-desist order. In such a case the discontinuance can hardly be thought to be voluntary." In these circumstances we believe that Part IV of the order, prohibiting tension relief claims for Anacin, is necessary to prevent future recurrence of past practices.

In addition, Part II.D of the order requires respondent to have a reasonable basis, consisting of competent and reliable scientific

evidence, for any other noncomparative representations concerning the effectiveness or freedom from side effects of its OTC drug products. In light of the overall history of advertising violations by AHP, described above, we believe this provision is necessary as a fencing-in measure to prevent respondent from making other unsubstantiated noncomparative claims.[90]

F. Corrective Advertising

This case also raises the question of when corrective advertising is appropriate to dissipate the lingering effects of false or deceptive advertisements. The order entered by the ALJ would include some of the corrective advertising proposed in the notice order accompanying the complaint: a disclosure in future advertising to correct a tension relief image would be required, but a disclosure to correct an "established superiority" image would not. AHP appeals **[56]**from the order to correct the tension relief image (R.A.B. at 73–83), while complaint counsel appeal from the failure to order a correction for the comparative efficacy and side effects claims (C.C.A.B. at 7).

It is well settled that the Commission may order prospective disclosures to correct misleading lingering impressions created or reinforced by previous advertising. *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Warner-Lambert Co.* 86 F.T.C. 1398 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). Once the Commission has determined that a false or deceptive image of a product exists in the minds of consumers, it may order the image corrected if it finds that advertising of the product is the primary source of the image, and that, absent correction, the image is likely to endure even after the advertising has ceased. *Warner-Lambert Co.*, *supra*, 86 F.T.C. at 1503 (1975); *Firestone Tire and Rubber Co.*, 61 F.T.C. 398, 429 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973) (separate statement of Commissioner Jones). In recognition of the nature and purpose of advertising, which is aimed at creating enduring product images, the Commission may in appropriate cases presume a lingering effect on consumers. *Warner-Lambert*, *supra*, 562 F.2d at 762; see also the Commission's Statement in Regard to Corrective Advertising, Trade Reg. Rep. (CCH) ¶ 39,046 (1979). See also *Note, Federal Trade Commission Authority to Order Corrective Advertising*, 1978 Wisc. L. Rev. 605, 624–25 (1978).

We must now apply these principles to the case before us.

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[90] See discussion *supra* at 47–49.

1. Tension Relief

Although consumer image and penetration studies in the record show that a significant number of consumers perceived Anacin to be effective for relief of tension (see, *e.g.*, CX 455Z027; CX 452Z024), we are not convinced that these images will persist.[91] **[57]**The studies reveal that consumers did not recall the tension relief theme as readily as other efficacy claims made by AHP. In the 1971 Bates (CX 477) and 1973 Sobel-Chaikin (CX 453) studies, for example, recall of the Anacin tension relief claim was much lower than recall of the pain relief claims (CX 477W (6%); CX 453035 (2%); Smith, Tr. 5876; I.D. at 122). Tension relief seems to have been a secondary image. When compared with other analgesics in the 1967 Glenbrook study, consumers preferred Anacin to other products much more often because of an image of superior efficacy for pain relief than because of an image of tension relief (CX 454Z022, Z029). In the 1969 Excedrin study (CX 462), only 10% of the respondents who stated that they used analgesics to relieve nervous tension used Anacin, as compared to 21% for Bayer (CX 452Z048), and there was little evidence of recall of the tension claim (Ross, Tr. 2216).[92]

There are two possible, related reasons why the evidence of lasting consumer recall of Anacin's tension relief message seems to be relatively weak.[93] First, tension relief appears to be a less important attribute of an analgesic to consumers than the relief of pain. Consumers tend to retain images of attributes that are most important to them, and their purchasing decisions are affected accordingly (Ross, Tr. 2083–84). Although the perceived ability of an analgesic to relieve tension may be significant to those consumers who seek such relief, the record demonstrates that most consumers consider analgesics most effective for pain relief. For example, the 1969 Excedrin study discussed above (CX 462) shows that strength claims penetrate to a far greater degree than other kinds of messages (CX 462Z070) and the 1967 Glenbrook Analgesics study (CX 454) found that speed (34%), strength (26%), and length (28%) of pain

[91] This conclusion does not conflict with our finding above that consumers did perceive such a message in the ads, or suggest that these claims should be allowed to continue if false or misleading. See generally F. 489 for discussion of the difference between evidence of perception of an advertising claim and evidence of retention of a lasting product image.

[92] In the 1975 Leavitt study (CX 457), only 1.4% of the population surveyed held a tension relief image (CX 457M). We do not rely on this study to assess consumer images, however, because of its serious flaws. See F.F. 528–563.

[93] We emphasize that we do not believe corrective advertising may only be imposed where there is an evidentiary basis like that in *Warner-Lambert*, *supra*. See *National Cmm'n on Egg Nutrition* v. *FTC*, *supra* at 165; Statement in Regard to Corrective Advertising, Trade Reg. Rep. (CCH) ¶ 39,046 (1979). For example, the Commission may, absent probative evidence one way or the other, infer that a deceptive advertisement will leave a lingering deceptive impression in consumers' minds. Here, however, for the reasons given, we decline to draw such an inference.

relief were far more significant to consumers than tension relief (19%). [58]

Second, the tension relief theme has not been the primary focus of AHP's advertising campaigns; the central theme has been effectiveness of its products for pain relief (CX 454; 462). Indeed, the ALJ found that the dissemination of advertisements containing tension relief claims ceased altogether in 1973 (F. 525). While the cessation of offending claims does not excuse respondent from liability for those claims, see *supra* at 55, the absence of those claims from the media over a period of several years is relevant to the likelihood that consumers have retained the erroneous product image and thus to the need for corrective advertising.

Since we are not convinced on this record that the tension relief claims are likely to endure in consumers' memories, we reverse the ALJ's decision to order correction of the tension relief message.

2. Comparative Claims

Complaint counsel argue on appeal that corrective advertising is necessary to remedy a false consumer belief that Anacin's superiority has been proven or "established," a belief instilled, they assert, by both advertisements expressly claiming proof and other comparative advertisements failing to disclose the existence of a substantial question. C.C.A.B. at 9, 12–13.[94] They ask the Commission to presume that unless corrected the belief in the proof of Anacin's superiority is one which will linger in consumers' minds beyond the life of the advertising which produced it, despite the absence of direct evidence on this claim's endurance (F. 573).

The record does provide considerable evidence indicating the existence, at least at the time the surveys were conducted (1967–70), of a widespread consumer belief in Anacin's superior efficacy. The 1970 Vanquish study (CX 455) shows that an image of extra strength "dominates brand perceptions" and "is highly correlated with market behavior" (CX 455I). The record demonstrates that a substantial number of consumers consider Anacin to be superior to other OTC analgesics for this characteristic; as complaint counsel's experts testified, several studies show that a superior efficacy image exists (Ross, Tr. 2080, 2184, 2193; Rossi, Tr. 1602, 1615). The 1969 Excedrin study (CX 462), for example, found that 53% of analgesics users described Anacin as "speedy" and 34% described it as "long-lasting" (CX 46Z004), as compared to other brands. The percentages

[94] Complaint counsel do not appear to seek a corrective remedy for advertising of APF. In light of our finding that APF ads did not make the "establishment" claim directly, (*supra* at 15 n *), we agree that a correction for APF ads would be less appropriate than one for Anacin ads.

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for Anacin users were even higher (73% and 50%) (CX 46Z005). The 1967 Glenbrook study demonstrates similar results (CX 454N). Dr. Ross and [59]Dr. Rossi thus both concluded that a substantial number of consumers believe Anacin to be more efficacious than aspirin (Ross, Tr. 2048; Rossi, Tr. 1570).[95]

We are also convinced that the primary source of this consumer belief in Anacin's superiority is the advertising of the product. F.F. 576–84. Respondent argues that this image may just as easily have been created by product usage (Resp. Ans. Br. at 26), and therefore that corrective advertising would be inappropriate (Resp. Ans. Br. at 24). Product usage, however, can be a primary source of a product image only if the consumer has the ability to discriminate objectively between various similar products (Ross, Tr. 2250). Where no objective test is performed, a consumer who believes before use that there is a difference between products is likely to experience a placebo effect, whereby such a difference is perceived when the products are used (Ross, Tr. 2253). Thus if a consumer is unable to evaluate objectively a product's actual efficacy, the role of advertising as a cause of the consumer image is enhanced (Ross, Tr. 2255). The record demonstrates that many consumers cannot determine the efficacy of OTC analgesics through actual usage, due to the possibility of such a placebo effect (Azarnoff, Tr. 626; DeKornfeld, Tr. 2785; see discussion *supra* at 19). And if product usage is not the cause of the consumer's image of these products, the primary source of the image is likely to be the advertising.[96]

We have already concluded that many of respondent's advertisements claiming Anacin's superior efficacy represented expressly and by clear implication that the product's superiority has been proven, and that other superior efficacy claims, when not qualified by a disclosure of the existence of a substantial question, also had a capacity to mislead consumers as to the existence of proof. Therefore, if we were to conclude that [60]the image of Anacin's superiority will endure unless corrected, we could logically presume that an image of proven superiority is also likely to linger in consumers' minds, and order the relief sought by complaint counsel.

There is some basis in this record for concluding that the superiority image, and thus the implicit proven superiority image,

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[95] Respondent argues that a study of data gathered by NPD Research, Inc. (RX 176–185) shows that any image consumers hold of Anacin's superior efficacy does not result in loyalty to the Anacin brand. Resp. Ans. Br. at 30. As the ALJ found, however, these data form a weak basis for conclusions about enduring consumer beliefs. F.F. 602–606, 609.

[96] We also reject respondent's theory that corrective advertising may only be required when advertising is the *sole* source of product images (Resp. Ans. Br. at 24). We need only find that the advertising played "a substantial role in creating *or reinforcing* in the public's mind a false belief about the product * * *." *Warner-Lambert, supra* 562 F.2d at 762 (emphasis added).

will endure. For example, the survey results appear to have been stable over several years, F.F. 503, 521, 568–9; and expert witnesses testified that the superiority image would last, F.F. 594–5. The Commission can also reasonably draw inferences about the endurance of the image from factors including the salience of the claim to consumers, the extent of dissemination, the forcefulness of the persuasive techniques used, and the likelihood that product usage will affect the image held. See F.F. 585–6, 590, 593, 597.

Corrective advertising need only be ordered, however, if we determine that it is the only way to ensure that the image of established superiority will not persist. Here, we believe that other remedial provisions in our order will do the job. A belief in the proven superiority of Anacin is most likely to continue if comparative claims continue to be made in Anacin advertising. But under this order, any future comparative efficacy or side effects claims must be effectively qualified—*i.e.*, corrected as to the lack of proof—unless the requisite proof actually exists, in which case there will be no further deception. Moreover, the order will prevent respondent from conveying an erroneous impression of the product's superiority (proven or not) by means of claims about the unusualness of the ingredient in the product, in that it will prohibit false unusualness claims and will require the disclosure, in many Anacin ads, of the familiar name of aspirin.

We believe that in the face of all of these measures, there is little likelihood that a false or unsubstantiated image of proven superiority will survive. Therefore, we affirm the ALJ's rejection of a corrective advertising provision for comparative efficacy claims.

G. Labeling

The ALJ's order would apply to the labeling as well as the advertising of respondent's products. Respondent argues that this requirement is unwarranted because its labeling practices were not at issue during the proceeding and because [61]the FDA has jurisdiction over labeling. While we believe that an order relating to labeling could properly be entered as a fencing-in provision, we do not believe that this is an appropriate instance for such an order. Our liaison agreement with the FDA recognizes that primary responsibility for labeling rests with the FDA, 36 FR 18539 (1971), and that agency is currently engaged in reviewing labeling claims for OTC drugs. In view of these circumstances, the attached order does not cover labeling.

H. Competitive Impact

AHP has requested in motions filed throughout this proceeding that the three cases instituted by the Commission involving advertising claims for OTC analgesic products should be a matter for a joint decision.[97] (*Bristol-Myers*, Docket No. 8917, involves claims for Bufferin and other products; *Sterling Drug*, Docket No. 8919, involves claims for Bayer Aspirin and other products.) AHP has argued that issuance of any Commission order adverse to it would cause it severe competitive injury, and that, at the very least, any such order entered prior to disposition of the other analgesics cases should take effect only upon the entry of final orders in the other cases. We find that the arguments offered by AHP in these motions do not justify the requested relief.

In several cases, respondents have sought to stay prosecution of Commission cases on the grounds that they will suffer competitive harm if prohibited from engaging in practices that are open to their competitors. The courts have held in such cases that the Commission has the discretionary authority to enter an order against one firm, even when its competitors are alleged to be engaged in the same practices and the **[62]**Commission has not similarly proceeded against any of them. See *FTC* v. *Universal Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958). The Commission's discretion in this area is limited only to the extent that it cannot institute proceedings which will arbitrarily destroy one of many alleged law violators in an industry. See *FTC* v. *Universal-Rundle Corp., supra*, 387 U.S. at 251.

These principles are certainly applicable here, where proceedings against AHP's competitors are already pending before the Commission[98]—though of course there is no certainty whether or to what extent those proceedings will result in orders covering AHP's competitors, as any such orders will depend solely on the evidence adduced therein. We note, moreover, that AHP's allegations of competitive harm were based in substantial part on the assumption that the Commission would adopt the corrective advertising provision of the ALJ's order[99]—a provision which we have rejected. In these circumstances, we believe that the public interest will be best

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[97] See Motion of American Home Products Corporation For Stay of this Proceeding Pending Consolidation of All Three Pending Analgesic Cases on Appeal (Dec. 19, 1979); Response of American Home Products To Complaint Counsel's Motion Requesting Expedited Decision (March 14, 1979); Motion of American Home Products Corporation to Stay the Appeal For the Purpose of Consolidating on Appeal All the Analgesic Proceedings (Sept. 29, 1978); Motion of American Home Products Corporation to Dismiss the Complaint or in the Alternative Suspend the Proceeding Due to Changed Circumstances (April 29, 1977).

[98] The Commission heard oral argument in *Bristol-Myers* in April, 1980; an initial decision was filed in January, 1981 in *Sterling Drug*.

[99] Motion of American Home Products Corporation to Stay the Appeal for the Purpose of Consolidating on Appeal All the Analgesic Proceedings, at p. 8 (Sept. 29, 1978).

served by issuing the cease and desist order in this proceeding for immediate effect.

Appendix

ALJ's Interpretation of the Advertisements

Respondent AHP contends that the ALJ's findings on the meaning of the challenged advertisements were based on an improper analysis of the record evidence (R.A.B. at 30–33).[1] Administrative law judge is authorized to use his own accumulated expertise in determining the meaning of advertisements (R.A.B. at 30). AHP urges, however, that the law judge erroneously failed to consider certain extrinsic evidence on the meaning of the challenged advertisements, and that he based his interpretations on a one-sided, selective use of the record (R.A.B. at 30–33). For the reasons stated below, we conclude that the ALJ properly considered the record evidence and determined the weight to be accorded the evidence with respect to each of the challenged advertising claims.

A. Relevance of Extrinsic Evidence in General

The legal test for determining whether advertising has violated Section 5 is whether the challenged representations have the capacity and tendency to deceive.[2] The Commission (and its ALJ) is authorized to make that determination without resort to expert testimony or consumer survey data, which constitutes a "surrogate form of direct consumer testimony."[3] Consistent with that standard, the ALJ primarily relied on his own experience and expertise in determining what direct or indirect representations were contained in the challenged advertising, but he [2]also considered the relevant extrinsic evidence in the record[4] (I.D. p. 165; F. 45), and properly

[1] The specific representations disputed on appeal by AHP are the alleged claims that: (1) AHP's products are superior to *all other* OTC analgesics; (2) the superiority of AHP's products has been established; (3) the analgesic ingredient in Anacin or APF is unusual, special, or stronger than aspirin; (4) Anacin relieves tension; and (5) within 22 seconds after taking Anacin a person may expect relief from headache pain. We have evaluated each of these alleged representations in turn, *supra*.

[2] See, *e.g.*, *Murray Space Shoe Corp.* v. *FTC*, 304 F. 2d 270, 272 (2d Cir. 1962); *United States Retail Credit Ass'n* v. *FTC*, 300 F.2d 212, 221 (4th Cir. 1962); *Rhodes Pharmacal Co.* v. *FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd on other grounds* 348 U.S. 940 (1955).

[3] *Ford Motor Co.*, 87 F.T.C. 756, 794 (1976); See *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965); *Standard Oil Co.*v. *FTC*, 577 F.2d 653, 659 (9th Cir. 1978); *J.B. Williams & Co.*v. *FTC*, 381 F.2d 884, 890 (6th Cir. 1967); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 454 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 112 (1974); *Carter Products, Inc.* v. *FTC*, 323 F.2d 523, 528 (5th Cir. 1963).

[4] In addition to the advertisements themselves, the evidence consists of (a) the testimony of experts in the

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determined its probity and weight based on a number of factors, including the qualifications and experience of respondents' expert and the format, methodology, and relevance of the consumer research upon which respondents' expert relied.[5] F. 46–48, 50, 59, 62–65, 486, 488–90, 492–93, 500, 525, 588; I.D. pp. 164–65.

B. Testimony of Dr. Smith

Among the extrinsic evidence considered by the ALJ was the testimony of respondents' expert witness, Dr. Joseph Smith, and certain consumer survey data upon which his conclusions were based. I.D. pp. 164–65. The ALJ specifically considered the mode of analysis used by Dr. Smith; determined the relevance and weight of his testimony based on established legal standards; and, on that basis, rejected his conclusions [3]on the meaning of the challenged advertisements. F.F. 47–48; I.D. pp. 164–66. Respondent claims, however, that the ALJ erroneously failed to credit Dr. Smith's testimony (*e.g.*, Tr. 5664–67; 5755–58) relating to the representations conveyed in the challenged advertising.

We find that the ALJ's decision not to credit Dr. Smith's testimony was entirely proper, and consistent with established principles of advertising interpretation. Dr. Smith's analysis of the challenged advertisements relied heavily on consumer survey data—"penetration" and "image" studies (Smith, Tr. 7442–49, 7454–58, 7518, 7562). These studies, however, do not address the question of whether or not a particular advertisement conveyed a particular claim.[6] Yet it is

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fields of consumer psychology and behavior, marketing, and marketing research; (b) AHP internal memoranda relating to AHP's awareness that certain advertising techniques were effective; (c) copy tests on Anacin television commercials, including the verbatim comments of consumers; (d) consumer studies relating to consumer perceptions of certain attributes of OTC analgesics; (e) "image" studies of consumer attitudes and beliefs about the Anacin brand and its competitors; and (f) "penetration" studies designed to evaluate consumers' ability to recall Anacin advertising themes. The only evidence bearing on the meaning of APF advertising is expert testimony and the APF advertisements themselves.

[5] Thus, the ALJ's use of such extrinsic evidence as exists in the record was consistent with our observation in *ITT Continental Baking Co.*, 83 F.T.C. 865, 954 (1973), *modified on other grounds*, 532 F.2d 207 (2d Cir. 1976), that while extrinsic evidence should be taken into consideration, its probity or weight will depend on the "qualification and experience of the particular expert involved and the validity and soundness of methodology utilized in the survey." Similarly, in *Cinderella Career & Finishing Schools, Inc.*v. *FTC*, 425 F.2d 583, 588–9 (D.C. Cir. 1970), and *Universal Camera Corp.*v. *NLRB*, 340 U.S. 474, 494–96 (1951), both cited in respondents' brief (R.A.B. at 36), the courts merely indicated that the Commissioners and the Board could not disregard entirely the examiner's findings of fact and conclusions of law and the evidence upon which they were based. In *Giant Food, Inc.* v. *FTC*, 322 F.2d 977, 982 (D.C. Cir. 1963), *appeal dismissed* 376 U.S. 967 (1964), the court held only that such extrinsic evidence as existed in the record supported the Commission's conclusion on the meaning of the term "manufacturer's list price."

[6] Dr. Smith himself testified that "penetration" studies are designed to test consumers' recollection, over a period of time, of an advertiser's promotional themes rather than consumer understanding of particular advertisements (Smith, Tr. 7443–45). The recollection of consumers over time, as measured by a penetration study, inevitably takes into account a myriad of factors other than the message content of individual ads, including the extent of dissemination and the memorability and pertinence of the various advertising themes (Smith, Tr. 7445). Dr. Smith also observed that "image" studies, which evaluate consumer beliefs and attitudes (*e.g.*, quality, price) about a particular product and its competitive profile without regard to the source of such views, are not designed

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beyond dispute that effective Section 5 enforcement requires that advertisers be held accountable for each advertisement on an individual basis.[7]

Moreover, Dr. Smith considered competitors' advertising claims to be relevant to an understanding of the representations contained in the challenged advertisements for Anacin and APF. He stated, for example, that the use of similar words or themes by competitors would either reduce substantially [4]the likelihood that the alleged message about Anacin would be perceived in the Anacin ads, or enhance the likelihood that if the message were perceived it would be "displaced" quickly (Smith, Tr. 5650–51). The ALJ properly determined that this testimony was entitled to little weight.[8] As we stated above, each challenged advertisement must be evaluated individually. Moreover, even if the meaning of Anacin ads as perceived by some consumers could have been affected by claims made in ads for competitors' products, *every* consumer perception of the Anacin messages alleged in the complaint would not have been "displaced" in the manner suggested.[9]

Dr. Smith also largely disregarded the nonverbal components of the challenged advertising in formulating his conclusions on their meaning (Smith, Tr. 7493–94). The ALJ correctly observed that this failure to assess the net impression of the advertisements diminished the probative value of the testimony. I.D. p. 164. [5]

C. ASI Copy Tests

Other extrinsic evidence considered by the ALJ consisted of the results of twenty copy tests conducted by Audience Studies, Inc. (ASI) that were placed into evidence by complaint counsel. CX 402, 404–07, 409, 412, 414, 415. These studies designed to elicit data from

to provide evidence on all of the possible meanings consumers take from specific advertisements of the product whose image is being studied (Smith, Tr. 5549–52; see also Sen, Tr. 7178–79, 7327–28).

[7] Thus, the legal determination as to whether an advertisement is deceptive is not based on its effectiveness relative to truthful ads in selling products (*Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 450 (1972), *aff'd* 481 F.2d 246 (6th Cir. 1973) *cert. denied*, 414 U.S. 112 (1974)), and the fact that nondeceptive ads may be part of an ad compaign is no basis for ignoring the ads which are deceptive (*Chrysler Corp.*, 87 F.T.C. 719, 751–52 (1976)).

[8] Respondent also claims that the ALJ erred in refusing to admit certain competitors' advertisements and in limiting the testimony of both Dr. Smith and Mr. DeMott (an AHP executive) addressing such advertisements (R.A.B. at 29). For the reasons given in the text, we believe the ALJ's actions were correct. Respondent misconstrues certain statements of complaint counsel in the Joint Hearings, which, respondent argues, constituted a concession that a competitor's advertising is relevant. The question discussed was whether a consumer survey reporting recall figures for Anacin, Excedrin and Bufferin should be admitted in the Bayer Aspirin portions (Joint Tr. 956–60) of *Sterling Drug*, Docket No. 8919. Complaint counsel stated that the data would serve as a basis for comparison for similar studies of Bayer advertising and specifically added: "I am not saying that you have to look at the advertisements of other products to understand the advertisement of Bayer * * *" (Joint Tr. 960).

[9] Advertisements frequently convey more than one meaning, but if one of them is misleading, the advertiser is liable for the misleading variation. See *e.g.*, *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161 n. 4 (7th Cir. 1977); *cert. denied*, 439 U.S. 821 (1978) *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962).

representative samples of consumers on the meanings conveyed by individual advertisements.[10] Respondents urge that the ALJ improperly failed to credit Dr. Smith's analyses of the verbatim responses elicited in the ASI tests. One of these analyses (RX 123–26) was performed in an attempt to determine whether the challenged advertising claims caused consumers to switch their purchasing preference or intent (Smith Tr. 7476). To prove that a deceptive claim has been made, however, complaint counsel need not show that it would have been likely to cause consumers to buy a product which they otherwise would not have purchased. *Firestone Tire & Rubber Co., supra*, 81 F.T.C. at 451. Dr. Smith himself conceded that his "switching" analysis shed no light on the question whether the advertisements conveyed the representations alleged (Smith, Tr. 7476).[11]

Respondent points also to Dr. Smith's analysis of the verbatim responses (RX 271) as conclusive proof that the claims alleged were not conveyed in the challenged advertising (R.A.B. at 31–32). That analysis is flawed, however, because Dr. Smith's approach was to code a response as a "directly-related recall" only if it recited the precise language of the alleged representation. See, *e.g*, Smith, Tr. 7541. We believe this to be an overly restrictive use of copy test results. Other expert testimony in the record shows, moreover, that a low response rate of verbatims falling into a particular category is meaningless without an assessment of the advertisement tested and all surrounding circumstances, and that even after such analysis it may be impossible to determine **[6]**conclusively that a given message was not communicated. (Lukeman, Tr. 241–44, 247–48; Seltzer, Tr. 367–68). In addition, the open-ended questioning technique used by ASI does not elicit an exhaustive playback from consumers of all the representations that may be perceived in the tested advertising. In sum, while such surveys can be a useful aid in advertising interpretation, and the ALJ used them for such assistance (I.D. p. 164), their limitations tend to diminish the significance of the absolute response rate for each advertising claim.

D. Other Objections

[10] In the copy tests involved here, audience members filled out their responses to a page of questions about their comprehension of the advertisements immediately after viewing the films. Approximately 30 to 40 minutes later, the audience members were presented with a recall document which asked them to write down all that they could remember about the advertisements. These "verbatim" responses were then tabulated and coded. Only twenty of the television advertisements, and none that appeared in print or were broadcast on radio, were subjected to ASI testing.

[11] Of course, the likelihood that consumers would alter their purchasing decisions on the basis of a claim or omission in advertising is relevant in determining the materiality of the claim, after it has been found to be deceptive or to have a capacity to deceive. See *supra* at 8–11 and 32–33.

AHP also urges that the ALJ erroneously precluded testimony of AHP's Whitehall Laboratories Division president, George DeMott, relating to the meaning of the challenged advertisements. (R.A.B. at 29). The ALJ's action in this instance was entirely correct because while Mr. DeMott was allowed to testify as to the general objectives of the company in designing its advertising strategies,[12] he was not offered as an expert qualified in advertising interpretation (Tr. 4689).

Finally, AHP contends that the ALJ committed reversible error by looking to certain post-complaint advertisements, which were admitted only for the purpose of assessing the appropriateness of any remedy and the currency of the advertising claims challenged in the complaint (Tr. 162–63, 674–77), to determine whether the alleged representations were made (R.A.B. at 30). The ALJ could not have used the post-complaint advertisements for assessment of the remedy, however, without first determining what representations they conveyed. In addition, most of the ALJ's findings cited by respondent rely on ads disseminated before the complaint issued, along with some disseminated later. In any event, there is no prejudice to respondent, because none of our conclusions with respect to claims made by respondents' advertising relies primarily on advertisements aired or printed after the complaint issued.

Thus, we hold that the ALJ engaged in a proper evaluation of the representations alleged to have been made in respondents' advertising.

SEPARATE STATEMENT OF COMMISSIONER CLANTON CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's order and opinion except for the portion that deals with the substantial question issue. On that point, I dissent.

The majority holds that American Home Products violated Section 5 of the FTC Act by failing to state in its advertisements that there was a substantial question in the scientific community as to the veracity of its comparative performance claims for Anacin and APF. The majority's holding is based on the conclusion that consumers reasonably believe that any comparative drug performance claim is

[12] Tr. 4651–59. See *supra* at 5–6.

backed, not merely by reasonable substantiation, but by data that will be accepted as proof within the scientific community. Unfortunately, the majority can cite practically nothing in the record that indicates what consumers are likely to believe is adequate substantiation for comparative drug claims. It is one thing to infer consumer beliefs where advertising expressly claims, or clearly implies, that scientific proof exists. But it is something else entirely to decide that consumers believe such proof exists where the advertisements are silent on the issue.

A brief review of complaint counsel's theory concerning the substantial question disclosure will explain the dearth of relevant evidence on consumer perceptions; it may also illuminate the majority's own, different approach to this issue. In brief, complaint counsel have argued that it is unfair for a drug advertiser to make a comparative performance claim with anything less than scientific proof as substantiation. In making this assertion, complaint counsel state candidly that they are not relying on the reasonable basis test set forth in *Pfizer*, 81 F.T.C. 156 (1972). They observe, in fact, that this case was tried differently from a reasonable basis case. CCAB at 48 n. 104. Specifically, the trial did not focus on whether respondent's substantiating evidence was reasonable under the criteria listed in *Pfizer*. Instead, complaint counsel have urged that the Commission move beyond the reasonable basis test and develop a new standard that is more appropriate to "the specific problems encountered in a particular market." CCAB at 47. Citing the FDA's standards for determining the efficacy and safety of drugs, complaint counsel arrive at the conclusion that fairness requires that comparative drug performance claims should be substantiated by two well-controlled, clinical tests. [2]

Complaint counsel then suggest that *National Dynamics*, 82 F.T.C. 488, 546 (1973), *aff'd* 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), and its progeny have established that if an advertiser's performance claims are unfair because they are not adequately substantiated, they are also deceptive because a performance claim must, as a matter of law, imply exactly the same level of substantiation that fairness requires. Under complaint counsel's approach, extrinsic evidence as to consumer assumptions about an advertiser's level of support appears to be wholly irrelevant; the implied claim of substantiation is legally determined by the standard necessary to avoid unfairness.

The ALJ evidently accepted complaint counsel's reasoning:

> [T]he consumers of OTC analgesic products are entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a sufficient kind and level of

substantiation for the claim. In the circumstances of this case, the only sufficient substantiation for the claim is that the claim is accepted by the medical-scientific community . . . .

It is also clear that the absence of that kind and level of substantiation leaves a substantial question regarding a claim of comparative or superlative efficacy or safety, and that the existence of such a question is a material fact, of which the failure to disclose will render an advertisement deceptive . . . . (I.D. p. 212–13.)

Although the ALJ's analysis of marketplace fairness seemingly is derived, at least in part, from *Pfizer* (*see* I.D. pp. 210–16), complaint counsel disavowed reliance on *Pfizer* and it is clear that respondent was given no opportunity to address the "reasonableness" of its substantiating data.

In my view, the approach taken by complaint counsel and the ALJ is deficient in several respects and the majority has properly declined to follow it. As articulated, the deception (or material omission) theory advanced by complaint counsel is not dependent upon actual or probable consumer beliefs; rather, it depends entirely upon some independent notion of fairness that is distinct from the reasonable basis doctrine of *Pfizer*. Such an approach does violence to the legal concepts of both deception and unfairness. [3]

To be sure, the substantiation doctrine is predicated upon both a deception and an unfairness rationale. *Jay Norris Corp.*, 91 F.T.C. 751, 854 (1978), *aff'd*, 598 F.2d 1244 (2d Cir. 1979). Thus the Commission has indicated that it is reasonable for consumers to assume that objective product or service claims are backed by some kind of substantiation and that merchants are in a better position than consumers to verify the claims made on behalf of their products or services. That analysis also recognizes that substantiation requirements may vary, depending on a variety of factors which are set forth in *Pfizer*. But that kind of approach hardly warrants use of an abbreviated unfairness test to justify inferences about specific consumer beliefs concerning the level of substantiation that the Commission feels is appropriate in a given case. Such an exercise produces an artificial deception standard that is divorced from the reality of reasonable consumer expectations; it also misperceives the nature of our unfairness jurisdiction, which requires that challenged practices be analyzed in terms of both public policy and consumer injury. *See Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction* in letter to Senators Danforth and Ford, December 17, 1980.

With respect to the unfairness issues, the problem with complaint counsel's arguments and the ALJ's reasoning is that they fail to balance the factors relevant to an unfairness case. Mention is made

in complaint counsel's answer brief and in the ALJ's initial decision that FDA regulations endorse the standard of two well-controlled clinical tests for safety and efficacy claims; this fact evidently provides some public policy justification for requiring similar proof in drug advertising. But the analysis cannot stop there. Regard must also be given to other relevant issues, such as the type and accessibility of data sufficient to constitute proof, or the type of consumer injury that would be risked if the advertiser possessed some lesser basis for its claims than scientific proof. It is thus impossible to declare that the substantiation the respondent did have on hand for its comparative advertisements was inadequate under an unfairness rationale.

The majority has not followed complaint counsel's approach. Rather, it attempts to imply a proof claim simply because the advertising at issue involves drugs. It is true, of course, that the Commission need not refer to consumer surveys or similar extrinsic evidence to interpret the meaning of an advertisement. *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374 (1965). Similarly, actual deception need not be shown by complaint counsel to carry its burden of proof. It is necessary only that the advertisement have the tendency or capacity to deceive. *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 680 (2d Cir. 1944); *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 441 (1972), *aff'd* 481 F.2d 246 (6th Cir. 1973), *cert. denied* 414 U.S. 112 (1974). Still, [4]these precedents do not give the Commission a carte blanche to assume that an advertisement makes every claim that it might theoretically imply. Nor do they give the Commission the expertise to define, without the aid of extrinsic evidence, the particular expectations that consumers bring to a challenged advertisement. Rather, the Commission's interpretation of an advertising claim must be reasonably grounded on the expressions in, and format of, the advertisement. *National Dynamics*, *supra* at 548; *see Standard Oil Co. of California* v. *FTC*, 577 F.2d 653 (9th Cir. 1978).[1]

In this case, however, the majority has decided that a proof claim is implied by *any* comparative drug advertisement, regardless of the wording or format involved. Moreover, on closer analysis of the majority's opinion, one finds that the majority does not even cite the comparative nature of the advertising to support its conclusion that consumers believe drug performance claims are supported by proof.

[1] In *Simeon Management Corp.* v. *FTC*, 579 F.2d 1137 (9th Cir. 1978), the Ninth Circuit upheld a Commission determination that some consumers would reasonably believe that the government exercised control over the promotion and use of prescription drugs. *Id.* at 1146. This determination was evidently made without the benefit of extrinsic evidence. However, there is an obvious difference between prescription drugs and such commonplace medicines as aspirin. It can hardly be assumed that consumer beliefs regarding prescription drugs also apply to aspirin. Furthermore, the Commission did not reach any conclusions in *Simeon Management Corp.* concerning the *type* of substantiation that might be required before an advertiser claimed that its drugs were safe and effective.

Instead, the majority opinion suggests that consumers are entitled to believe that the drug advertiser has proof simply because the sale of drugs raises safety and health issues.

This assumption about consumer beliefs is not clearly implied by drug advertising in general. Neither is it supported by previous Commission determinations on the meaning of advertisements. The Commission has, of course, held on several occasions that consumers would reasonably believe that an advertiser had conducted scientific tests or surveys to support its claims. *Standard Oil Co. of California* v. *FTC*, *supra*; *Litton Industries*, Dkt. No. 9123 (filed January 5, 1981); *Crown Central Petroleum Corp.*, 84 F.T.C. 1493 (1974). Those cases are readily distinguishable, however. The proof and testing claims in *Standard Oil*, *Crown Central* and *Litton* were made explicitly. Better analogues to the advertising in this case may perhaps be found in the comparative claims at issue in *Firestone Tire and Rubber Co.*, *supra*. The advertisements there claimed the Firestone tires "stopped 25% quicker" than competing brands. [5]We held that this assertion implied that scientific tests had been conducted to support the claim. In so ruling, we noted that a specific percentage was used to make the superiority claim and that the claim directly addressed significant safety concerns. By contrast, in this case, product performance was typically not compared in specific objective terms. Furthermore, the comparative claims did not raise safety issues. In the absence of such considerations or more direct evidence of consumer beliefs, I think the Commission should be loath to speculate as to what consumers may independently think about a product or the type of data needed to support claims concerning it.[2]

I am also concerned that the majority's attempt to limit its substantial question analysis to comparative drug advertising will prove untenable in the future. There is nothing in the majority's reasoning to suggest that proof-type substantiation would not also be required for noncomparative drug claims. Furthermore, there are many comparative performance claims outside the drug area that, if the majority's reasoning is followed, consumers would have equal reason to believe are substantiated by scientific proof. For example, if consumers believe that there are scientifically acceptable tests to

[2] Of course, if surveys or expert testimony showed that consumers actually believed, or were likely to believe, that the advertising made proof claims, some type of action might be appropriate. Here, however, the majority can point to no such evidence. The majority opinion notes that respondent conceded that a simple comparative performance claim for drugs would suggest that the underlying substantiation should be acceptable to responsible medical experts. The majority also notes that Dr. Smith, respondent's expert, admitted that consumers are likely to expect that drug product claims will have greater substantiation than other types of claims. See note 53 on page 31 of majority opinion. But these admissions fall far short of accepting the argument that consumers would assume that any comparative drug claim must be proven scientifically before it is advertised.

support the claim that one aspirin is better than another, it would be reasonable to assume that they believe similarly rigorous evidence supports any comparative claim that touches on health or safety issues. It is not clear where the line should be drawn under the proposed substantial question doctrine, which is a good reason why this test should not be used at all.

Finally, it should be obvious that a substantial question analysis is an ungainly tool for measuring deception in the instant case. The situation here is quite dissimilar from that in *National Commission on Egg Nutrition*, 88 F.T.C. 89 (1976), *modified in part*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), where the respondent made affirmative claims that no scientific evidence linked the [6]consumption of eggs with increased risk of heart attack. The existence of just such a diet-health link was, in fact, the subject of lively debate among interested doctors, nutritionists, and researchers. In those circumstances, it was entirely appropriate to require that the fact of that debate be disclosed. Here, the notion of a substantial question regarding Anacin's and APF's superiority is more artificial. There is no actual debate in the medical and scientific communities about the relative efficacy of different analgesics. Rather, the record suggests that most researchers would simply dismiss a respondent's purported substantiation as inadequate to establish anything scientifically. Thus, ironically, to allow respondent to say even that there is a substantial question regarding its proof may actually countenance deception.

The most sensible manner of analyzing the substantiation for comparative drug advertisements that do not make establishment claims is simply to ask whether there is a reasonable basis to support them. It does not assume much, I think, to believe that consumers generally regard product performance claims to have some reasonable support. The Commission is then in a position to identify the precise level of support that is reasonable in each instance by referring to the criteria set forth in *Pfizer*. This analytical approach is flexible enough to permit respondents an opportunity to submit evidence on the feasibility of conducting scientific tests or research. As *Pfizer* suggests, however, in some circumstances the only reasonable basis may be medical or scientific proof. We might very well have reached that conclusion here. Unfortunately, we cannot resolve that question because the case was not tried on the theory that respondent's comparative claims lacked any reasonable basis. That omission may have been unfortunate, but we should not cure the problem by seeking to ground liability on a theory that has

inadequate record support and by ordering a remedial disclosure that is inappropriate to the circumstances of this case.

Final Order

This matter has been heard by the Commission upon the appeal of counsel for respondents and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. The Commission, for the reasons stated in the accompanying Opinion, has granted each appeal in part, and denied each in part. Therefore,

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission except as is otherwise inconsistent with the attached opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be entered:

Order

I

It is ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or [2]through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that a claim concerning the superior effectiveness or superior freedom from side effects of such product has been established or proven unless such representation has been established by two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the comparative effectiveness or comparative freedom from side effects of the drugs involved, on the basis of which it could fairly and responsibly be concluded by such experts (1) that the drug will have the comparative effectiveness or freedom from side effects that it is represented to have, and (2) that such comparative effectiveness or

freedom from side effects is demonstrated by methods of statistical analysis, and with levels of confidence, that are generally recognized by such experts. The investigations shall be conducted in accordance with the procedures set forth below:

At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be conducted on any disease or condition referred to, directly or by implication; or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is effective. The clinical investigations shall be conducted as follows:

1. The subjects must be selected by a method that:

a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any); **[3]**

b. Assigns the subjects to the test groups in such a way as to minimize bias; and

c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity or duration of disease or condition (if any), and use of drugs other than the test drugs.

2. The investigations must be conducted double-blind, and methods of double-blinding must be documented. In addition, the investigations shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.

3. The plan or protocol for the investigations and the report of the results shall include the following:

a. A clear statement of the objective of the investigation;

b. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response and steps taken to minimize bias on the part of subject and observer;

c. A comparison of the results of treatments or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data.

d. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

B. Making any representation, directly or by implication, of superior effectiveness or freedom from side effects of such product unless:

1. The superior effectiveness or superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or* [4]

2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the comparative efficacy or side effects claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

II

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any other non-prescription drug product, in or affecting commerce, as "commerce" and "drug" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when such ingredient is commonly used in other non-prescription drug products intended for the same use or uses as the product advertised by respondent.

B. Making any false representation that such product has more of an active ingredient than any class of competing products.

C. Misrepresenting in any manner any test, study or survey or any of the results thereof, concerning the comparative effectiveness or freedom from side effects of such product.

D. Making any noncomparative representation, directly or by implication, concerning the effectiveness or freedom from side

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effects of such product unless, at the time such representation is made, respondent has a reasonable basis for such representation which shall consist of competent and reliable scientific evidence. [5]

III

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," "Arthritis Pain Formula," or any products in which "Anacin" or "Arthritis Pain Formula" is used in the name, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and conspicuously that the analgesic ingredient in such product is aspirin, when such is the case and when the advertisement makes any performance claim for the product.

IV

It is further ordered, That respondent American Home Products Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of "Anacin," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, that Anacin relieves nervousness, tension, anxiety or depression or will enable persons to cope with the ordinary stresses of everyday life.

V

It is further ordered, That respondent the C.T. Clyne Company, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of "Arthritis Pain Formula" or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that

such product contains any unusual or special ingredient when respondent knows or has reason to know that such ingredient is commonly used in other non-prescription internal analgesic products for the same use or uses as the product advertised by respondent. [6]

B. Making any representation, directly or by implication, of superior freedom from side effects of such product, unless:

1. Respondent knows or has reason to believe that the superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or*

2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

VI

It is further ordered, That respondents American Home Products Corporation and the C.T. Clyne Company, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in their respective corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in their respective corporation which may affect compliance obligations under this Order. [7]

VII

It is further ordered, That the respondents herein shall within sixty (60) days after service of this Order upon them, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which they have complied or intend to comply with this Order.

Paragraphs Eight A.4, Eight B.2, and Ten B. of the Complaint are hereby dismissed.

IN THE MATTER OF

CRUSH INTERNATIONAL LIMITED, ET AL., DKT. NO. 8853

DR. PEPPER COMPANY, DKT. NO. 8854

THE SEVEN-UP COMPANY, DKT. NO. 8857

THE ROYAL CROWN COLA COMPANY, DKT. NO. 8858

NORTON SIMON, INC., ET AL., DKT. NO. 8877

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Complaints, July 15, 1971 and March 3, 1972**—Order, Sept. 15, 1981*

This order dismisses without prejudice the complaints issued by the Commission in 1971–1972, against five major soft drink manufacturers charged with attempting to restrict where bottlers may sell, by including "territorial exclusivity" provisions in their licensing agreements. The Commission concluded that since the instant complaints were based on the same legal standards utilized in the matters of Coca-Cola Co. and Pepsico Co. which were subsequently set aside due to changes wrought by the 1980 Soft Drink Interbrand Competition Act, further proceedings would not be in the public interest at this time.

Appearances

For the Commission: *Ronald A. Bloch* and *David I. Wilson.*

For the respondents: *Louis J. Keating, Kirkland & Ellis*, Chicago, Ill., for Crush International, Ltd., *W. D. White, Sr., Rain, Harrell, Emery, Young & Doke*, Dallas, Tex., for Dr. Pepper Co., *Eugene J. Meigher, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C., for The Seven-Up Co., *James H. Wallace, Jr., Kirkland & Ellis*, Washington, D.C., for The Royal Crown Cola Co., and *Edwin S. Rockefeller, Bierbower & Rockefeller*, Washington, D.C., for Norton Simon, Inc., and Canada Dry Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof, each of which separately is made and sometimes hereinafter referred to as respondent(s), or respectively as Crush International Limited, Beverages Internation-

* Crush International Limited, et al., Dr. Pepper Co., The Seven-Up Co., and The Royal Crown Cola Co.

** Norton Simon, Inc., et al.

al Inc. or Crush International Inc., have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent Crush International Limited is a corporation organized, existing and conducting its business under and pursuant to the laws of the Province of Ontario, Canada. It maintains its office and principal place of business at 1590 O'Connor Drive, Toronto 16, Canada. In the United States, an office is maintained at 2201 Main St., Evanston, Illinois.

Respondent Beverages International Inc., a wholly-owned subsidiary of Crush International Limited, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Illinois. It maintains its office and principal place of business at 2201 Main St., Evanston, Illinois. [3]

Respondent Crush International Inc., a wholly-owned subsidiary of Crush International Limited, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 2201 Main St., Evanston, Illinois.

PAR. 3. Respondent Crush International Limited is engaged principally in the manufacture and sale of concentrate which it sells to its bottlers who purchase the concentrate under a license to produce and sell soft drink products under such trade names as "Orange Crush," "Gurd's Ginger Ale," "American Dry Ginger Ale," "Hires Root Beer," "Kick-Kola," "Grape Crush," "Lime Crush," "Grapefruit Crush," "Lemon-Lime Crush Cola," "Crush Cream Soda," "Bitter Lemon," "Brio Chinotto," and "India Express."

Plants for the manufacture of concentrate are located in Canada at Toronto and Ottawa, Ontario and Montreal, Quebec, and in the United States at Evanston, Illinois and Trenton, New Jersey. Approximately 300 United States and 30 Canadian bottlers are franchised to sell its Orange Crush and/or Hires Root Beer soft drink products. Bottlers combine the concentrate with water and other ingredients and package the mixture in bottles for resale as soft drink products to retailers.

For the year ending October 30, 1968, Crush International Limited had sales of $33,069,442, and assets of $21,178,277 (Canadian dollars). As to its wholly-owned United States subsidiaries, Beverages International Inc. and Crush International Inc., sales of concentrate and Orange Crush and Hires Root Beer soft drink products were made to over 300 domestic bottlers in 1968. In the

United States, agreements for Orange Crush and Hires Root Beer trademarked concentrate and soft drink products are between the bottler and Crush International Inc. and Beverages International Inc.

Corporate officers of Beverages International Inc. and Crush International Inc., are identical; and Mr. Louis Collins is President of these respondents as well as of respondent Crush International Limited.

PAR. 4. Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate and foreign commerce regarding concentrate and soft drink products [4]exists between offices in Evanston, Illinois and Toronto, Ontario, and production facilities in Canada at Toronto and Ottawa, Ontario, and Montreal, Quebec, and in the United States at Evanston, Illinois, and Trenton, New Jersey, and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondents Beverages International Inc., or Crush International Inc., and their bottlers. A typical agreement between respondents Beverages International Inc., or Crush International Inc., and their bottlers provides that:

> Bottler shall use its best efforts to sell [CRUSH/HIRES] within TERRITORY and not deliver or sell [CRUSH/HIRES] outside of TERRITORY. Bottler shall not knowingly sell [CRUSH/HIRES] within TERRITORY for resale or delivery outside of TERRITORY or sell or deliver [CRUSH/HIRES] to any person after having been notified by COMPANY that such person is reselling or delivering [CRUSH/HIRES] outside TERRITORY.

PAR. 7. The aforesaid agreements used by respondents, Beverages International Inc. and Crush International Inc., the wholly-owned subsidiaries of respondent Crush International Limited, have had, and may continue to have, the following effects:

(a) Competition between and among respondents' bottlers in the distribution and sale of "Hires Root Beer" and "Orange Crush" brands of soft drink products has been eliminated;

(b) Innumerable retailers and other customers have been deprived of the right to purchase "Hires Root Beer" and "Orange Crush" brands of soft drink products from the bottler of their choice at a competitive price; and [5]

(c) Consumers of "Hires Root Beer" and "Orange Crush" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Dr. Pepper Company, hereby made and sometimes hereinafter referred to as respondent, or Dr. Pepper, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by

respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent; [2]

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Colorado. It maintains its office and principal place of business at 5523 Mockingbird Lane, Box 5986, Dallas, Texas. Respondent had sales of $41,883,072 and assets of $19,479,696 in 1969. In 1968, Dr. Pepper made sales to over 482 bottlers located in every state of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 482 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute." Dr. Pepper bottlers combine the concentrate with water and other ingredients and

package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers, Dr. Pepper operates bottling plants in three areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in pre-mix concentrate and soft drink products exists between its headquarters and production facilities located in Dallas, Texas, and the numerous bottlers located throughout the United States which purchase its products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Dr. Pepper has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler ". . . at all times agrees not to sell bottled Dr. Pepper outside the said licensed territory and not to sell such product knowingly to any purchaser who intends to place such product for sale outside the said licensed territory . . ."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute" brands of soft drink products has been eliminated;

(b) Competition between and among Dr. Pepper's bottling operations and its bottlers in the distribution and sale of Dr Pepper soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute" brands of soft drink products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Dr. Pepper," "Dietetic Dr. Pepper" and "Salute" brands of soft drink products have been deprived of the

opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Seven-Up Company, hereby made and sometimes hereinafter referred to as respondent, or Seven-Up, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacturing and sale primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central Warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent; [2]

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for produc-

tion or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with six ounces of carbonated water to produce 600 six-ounce finished soft drink servings;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Missouri. It maintains its office and principal place of business at 121 South Meramec, St. Louis, Missouri. Respondent had sales of $83,255,014 and assets of $38,894,206 in 1969. In 1968, Seven-Up made sales to over 470 domestic bottlers located in every State of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 470 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "7-Up," "Diet 7-Up," "LIKE" and "Howdy." Seven-Up bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers.

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate [3]commerce in concentrate and soft drink products exists between its headquarters and production facilities located in St. Louis, Missouri, and the numerous bottlers located throughout the United States which purchase its products.

PAR. 5. In the course and conduct of its business, respondent,

except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Seven-Up has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix concentrates and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers.

A typical agreement between respondent and its bottlers provides that the ". . . Bottler shall not directly or indirectly sell or distribute 7-Up in any territory other than hereinbefore described."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products has been eliminated;

(b) Innumerable retailers and other customers have been deprived of the right to purchase "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products from the bottler of their choice at a competitive price; and

(c) Consumers of "7-Up," "Diet 7-Up," "LIKE" and "Howdy" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices. [4]

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix concentrates and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Royal Crown Cola Company, hereby made and sometimes hereinafter referred to as respondent, or Royal Crown, has violated the

provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondent, usually as a syrup, and which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups;

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent; [2]

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a tank, usually having about a five-gallon capacity and mixes it at the point of sale with five ounces of carbonated water to produce approximately 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a tank, usually having about a five-gallon capacity, a finished serving of soft drink product containing both syrup and carbonated

water, "pre-mixed," to produce 100 six-ounce soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1000 10th Ave., Box 1440, Columbus, Georgia. Respondent had sales of $80,059,394 and assets of $23,873,489 in 1969. In 1968, Royal Crown Cola made sales to over 333 domestic bottlers located in every state of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 333 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade." Royal Crown bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition, to manufacturing and selling concentrate to its bottlers, it operates bottling plants in seven areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities located in Columbus, Georgia, and the numerous bottlers located throughout the United States which purchase its products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

PAR. 6. Royal Crown has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its franchised bottlers. A typical agreement

between respondent and its bottlers provides that "The license of the bottler to sell Royal Crown beverages and to use the company's Royal Crown trademark is limited to the described territory, and the bottler shall not sell Royal Crown beverages to any person for resale without the limits of said territory."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products has been eliminated;

(b) Competition between and among Royal Crown's bottling operations and its bottlers in the distribution and sale of Royal Crown soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Royal Crown," "Diet Rite," "Nehi," "Par-T-Pak," "Kick," "Lift" and "Gatorade" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products, deprive, and may continue to deprive, the public of the benefits of competition in the purchase of pre-mix, post-mix and soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that Norton Simon, Inc. and its wholly-owned subsidiary, Canada Dry Corporation, each hereby made and sometimes hereinafter referred to as respondent(s), or as Norton Simon or Canada Dry, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by

it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) *Bottler* - any individual, partnership, corporation, association or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) *Central warehousing* - a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) *Concentrate* - the basic soft drink ingredient sold to bottlers by respondents, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) *Consignment* - a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) *Place of business* - the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) *Post-mix syrup* - soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) *Pre-mix syrup* - although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) *Soft drink products* - nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in

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bott' s and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent Norton Simon is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 230 Park Ave., New York, New York. Respondent Norton Simon had sales of $1,046,031,000 in 1970 and of $984,428,000 in 1969. Assets totaled $734,545,000 in 1969. [3]

Respondent Canada Dry, since 1968 a wholly-owned subsidiary of Norton Simon, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at 100 Park Ave, New York, New York. Respondent Canada Dry was incorporated in the State of Delaware on June 30, 1969. Respondent Canada Dry is the successor to the concentrate and soft drink business of an earlier corporation which was incorporated in the State of Delaware on May 13, 1968, as the Nadaca Beverage Corporation; such name being changed to Canada Dry Corporation on July 17, 1968. The Nadaca Beverage Corporation was the successor to all business of another Canada Dry Corporation which was incorporated in the State of Delaware on June 1, 1925. Whenever activities, undertakings, arrangements or agreements of respondent Canada Dry are alleged to have occurred prior to June 30, 1969, it shall refer to the appropriate predecessor corporation during the applicable period. In 1969, Respondent Canada Dry had sales of approximately $7,300,000 for soft drink concentrate to over 190 licensed bottlers located in every State of the United States. Total soft drink sales by Canada Dry were $108,200,000 in 1969.

PAR. 3. Respondent Norton Simon through various subsidiaries, is engaged in diverse businesses, such as the sale of soft drink products and concentrate, and distilled spirits (Canada Dry), food and food service (Hunt Foods & Industries, Inc.), packaging systems (United Can Co., and Glass Containers Corp.), and communications (McCall Publishing Co., and Saturday Review, Inc.). In 1969 sales by respondent Canada Dry (including distilled spirits sales) accounted for approximately 20% of total sales by Norton Simon. In 1967, prior to its acquisition by Norton Simon, Canada Dry had net sales in excess of $175,000,000.

Respondent Canada Dry is engaged principally in the manufacture and sale of concentrate which it sells to its over 190 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as 'Wink,"

"Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brand ginger ale, club soda, collins [4]mixer, quinine water, bitter lemon, and various flavored beverages including root beer, orange, grape, lemon-lime, black cherry, and strawberry. Canada Dry bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its bottlers, Canada Dry operates bottling plants in several areas of the United States and sells soft drink products to retailers.

PAR. 4. Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that Norton Simon, through its wholly-owned subsidiary, Canada Dry, causes a continuous flow of interstate commerce in soft drink products and concentrate to exist between Canada Dry headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondents and their bottlers. A typical agreement between respondent Canada Dry and its bottlers provides that:

> ARTICLE 1. *License and Territory.* Canada Dry hereby grants the Bottler and the Bottler hereby accepts from Canada Dry an exclusive license to manufacture, bottle, sell and distribute the "CANADA DRY" beverages referred to below in the following territory only . . . .

or provides that: [5]

> The Bottler agrees that it will not manufacture, bottle, sell or distribute, directly or indirectly . . . carbonated beverages under the trade names or trademarks of Canada Dry elsewhere than in the territory hereinabove described.

Canada Dry also sells soft drink products to bottlers (as that term is defined heretofore) in bottles and cans pursuant to an agreement which typically provides that:

In as much as a portion of the State of Texas is served by franchised Bottlers, we ask that you do not, under any circumstances, make deliveries of Canada Dry merchandise into the following areas:

[The territory is described.]

PAR. 7. The aforesaid agreements used by respondents have had, and may continue to have, the following effects:

(a) Competition between and among respondent Canada Dry bottlers in the distribution and sale of "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products has been eliminated;

(b) Competition between and among Canada Dry's bottling operations and its bottlers in the distribution and sale of Canada Dry soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products from the bottler of their choice at a competitive price; and

(d) Consumers of "Wink," "Sport Cola," "HI-SPOT," "Tahitian Treat," and "Canada Dry" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices. **[6]**

PAR. 8. Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JULY 22, 1981

On July 15, 1971, the Commission issued its complaints against Crush International Limited et al., Dr. Pepper Company, The Seven-Up Company and Royal Crown Cola Co. These were mailed on July 27, 1971. The complaint against Norton Simon, Inc. and Canada Dry Corporation was issued on March 3, 1972 and was mailed on March

9, 1972. Respondents in these five cases were charged with violating Section 5 of the Federal Trade Commission Act for including "territorial exclusivity" provisions in their licensing agreements with soft drink bottlers.

In view of the decision of the United States Court of Appeals for the District of Columbia in *Coca-Cola Co.* v. *Federal Trade Commission*, 642 F.2d 1387 (D.C. Cir. 1981), complaint counsel has filed motions to dismiss these proceeding as to all respondents.

Section 3.22(e) of the Rules of Practice provides that an initial decision shall be filed when a motion to dismiss is granted. Since it appears appropriate to grant complaint counsel's motion to dismiss, the following findings of fact and conclusions of law are hereby made: [3]

Findings of Fact

1. Although, as indicated above, complaints were issued against these five respondents, the cases were never adjudicated.

2. These cases are companions to *The Coca-Cola Co.*, Docket No. 8855, and *Pepsico, Inc.*, Docket No. 8856, two matters fully adjudicated and decided by the Commission on April 7, 1978. (91 F.T.C. 517 and 680).

3. On September 19, 1978, then-assigned Administrative Law Judge Joseph P. Dufresne issued an order staying proceedings in these cases pending appellate review of the Commission's decisions in *Coca-Cola* and *Pepsi*.

4. In *Coca-Cola Co.* v. *Federal Trade Commission*, the United States Court of Appeals, District of Columbia Circuit, set aside the Commission's order in *Coca-Cola* and *Pepsi*, because they were based upon legal standards differing from those contained in the subsequently enacted Soft Drink Interbrand Competition Act. 15 U.S.C. 3501 *et. seq.* . The cases were remanded to the Commission for dismissal.

5. On April 1, 1981, the Commission ordered that these proceedings be dismissed without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act.

Conclusions

Since the instant complaints are based upon the same superseded standards under which the *Coca-Cola* and *Pepsico* cases were decided, it is concluded that there is no presently existing public interest in continuing these matters, and that complaint counsel's motion should be granted.

ORDER

These cases are companions to *The Coca-Cola Company*, Docket No. 8855 and *Pepsico, Inc.*, Docket No. 8856, two matters which the United States Court of Appeals for the District of [2]Columbia in *Coca-Cola* v. *FTC*, 642 F.2d 1387 (D.C. Cir. 1981), set aside because they were based upon legal standards differing from those contained in the Soft Drink Interbrand Competition Act, 15 U.S.C. 3501, *et seq.* These companion cases were thereafter dismissed by the Commission without prejudice to any further proceeding under the standards of the Soft Drink Interbrand Competition Act. In view of the action of the Court of Appeals, complaint counsel filed a motion before the Administrative Law Judge to dismiss these proceedings as to all respondents. The Administrative Law Judge filed his Initial Decision in these matters on July 22, 1981, dismissing the complaints as to all respondents, without prejudice to the Commission's right to institute new proceedings under the standards set forth in the Soft Drink Interbrand Competition Act, should it determine that the public interest so requires.

Now, *it is hereby ordered,* that the Initial Decision and Order be, and hereby is, effective immediately.

Commissioner Pertschuk did not participate.

IN THE MATTER OF

GEORGE IRVIN CHEVROLET COMPANY

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH-IN-LENDING ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9124. Complaint, March 6, 1979—Decision, Sept. 15, 1981

This consent order requires, among other things, a Denver, Colorado, motor vehicle dealer to cease failing to make all the credit disclosures required by Federal law. Further, respondent is prohibited from using certain credit terms in advertisements promoting credit sales, unless those advertisements also include statutorily required information in the manner prescribed by Regulation Z.

Appearances

For the Commission: *George S. Meyer* and *Cyrus Callum.*

For the respondent: *Glenn A. Mitchell, Michael G. Charapp,* and *David U. Fierst, Stein, Mitchell & Mezines,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth-in-Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that George Irvin Chevrolet Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and the implementing regulations promulgated under the Truth-in-Lending Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. George Irvin Chevrolet Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado with its principal office and place of business located at 390 South Colorado Boulevard, Denver, Colorado.

PAR. 2. Respondent is now, and for many years has been, engaged in the sale and distribution of new and used motor vehicles. Respondent also provides a variety of automotive products and services to consumers.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly arranges for the extension of con-

sumer credit and is a creditor, as "consumer credit" and "creditor" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth-in-Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course and conduct of its business, has caused to be televised advertisements, which aid, promote or assist, directly or indirectly, credit sales and other extensions of other than open end credit, as "advertisement" and "credit sale" are defined in Section 226.2 of Regulation Z.

PAR. 5. Respondent, in certain of these televised advertisements, has stated the amount of the downpayment, the amount of the periodic installment payment, the number of installment payments, or the period of repayment without also stating, clearly, and conspicuously, as required by Section 226.10(d)(2) of Regulation Z, all of the following terms:

1) the cash price;
2) the amount of the downpayment required, or that no downpayment is required, as applicable;
3) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
4) the amount of the finance charge expressed as an annual percentage rate; and
5) the deferred payment price.

PAR. 6. Respondent, in certain of these televised advertisements, has stated at various times the annual percentage rate, the cash downpayment and the deferred payment price in terminology other than that prescribed by Section 226.8 of Regulation Z, and contrary to Section 226.10(d) of Regulation Z.

PAR. 7. Respondent, in certain of these televised advertisements, has used an advertising format in which the audio portion of the advertisement contained only certain credit representations selected for emphasis, while the video portion of the advertisement contained credit disclosures required by Section 226.10(d)(2) of Regulation Z. For example, respondent televised an advertisement on June 16, 1977, which made use of a videographic "crawl," a moving line of print displayed across the television screen, that disclosed the following verbatim: "NO DOWN 60 PMTS. OF $193.07 DEF. PRICE $11,584.20 ANNUAL % RATE OF 14.13% PLUS TAXES AND D & H OF $48.50 SUBJ. TO PRIOR SALE STK. #790." In this advertisement, the audio portion stated only the amount and period of installment payments. This format constitutes a failure to make

disclosures clearly, conspicuously and in a meaningful sequence, as required by Sections 226.6(a) and 226.10(d)(2) of Regulation Z.

PAR. 8. By and through the acts and practices set forth above, respondent has failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth-in-Lending Act. Pursuant to Section 103(s) of the Truth-in-Lending Act, such failure to comply with Regulation Z constitutes a violation of that Act, and, pursuant to Section 108(c) thereof, respondent has engaged in unfair or deceptive acts and practices and has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of the Truth-in-Lending Act and the implementing regulations promulgated thereunder and of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.24(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.24(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent George Irvin Chevrolet Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 390 South Colorado Boulevard, in the city of Denver, State of Colorado.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent George Irvin Chevrolet Co., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation or other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 CFR 226 *et seq.*) of the Truth-in-Lending Act (Pub. Law 90–321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Stating that no downpayment is required, or stating the amount of the downpayment or of any installment payment required (either in dollars or as a percentage), the dollar amount of any finance charge, the number of installments or the period of repayment, or stating that there is no charge for credit, unless all of the following items are also clearly and conspicuously set forth in terminology prescribed by Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price;
(b) the amount of the downpayment required or that no downpayment is required, as applicable;
(c) the number, the amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
(d) the amount of the finance charge expressed as an annual percentage rate; and
(e) the deferred payment price.

2. Failing in connection with all television and radio advertisements in which cost of credit disclosures must be made pursuant to Section 226.10(d)(2) of Regulation Z, to make such disclosures clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z. The following standards shall be met in order for a television advertisement to be deemed a "clear and conspicuous" disclosure within the meaning of this order:

(a) (i) the finance charge expressed as an annual percentage rate shall be presented simultaneously in both the audio and video portions of the television advertisement;
(ii) the remaining disclosures required by Section 226.10(d)(2) of

Regulation Z shall be presented in the video portion of the television advertisement;

(iii) any of the remaining disclosures required by Section 226.10(d)(2) of Regulation Z may be presented in the audio portion of the television advertisement, but if so presented, shall be presented simultaneously and in identical sequence in both the audio and video portions of the television advertisement;

(b) the video portion of the required credit disclosures shall contain letters large enough to be easily seen and read with reasonable ease on all television sets, regardless of picture tube size, that are commercially available to the consuming public;

(c) the video portion of the required credit disclosures shall contain letters of a color or shade that readily contrasts with the background on both color and black and white television sets. The background shall consist of only one color or shade;

(d) during the video portion of the required credit disclosures, no words or images shall appear on the television screen which are not part of the required disclosures; *provided, however*, that during said disclosures two-thirds of the television screen may contain images which do not obscure or detract attention from the required disclosures;

(e) the video presentation of the required credit disclosures shall be no less than ten seconds' duration;

(f) during the audio portion of the required credit disclosures, no sounds which obscure or detract attention from the required disclosures may be presented;

(g) the audio portion of the required credit disclosures shall be spoken with sufficient deliberateness, clarity, and volume, so as not to obscure or detract attention from the required disclosures made in either the video or audio portion;

(h) the audio and video portions of the required credit disclosures shall immediately follow the specific representation which triggers the affirmative disclosure requirement contained in Section 226.10(d)(2) of Regulation Z;

(i) the audio and video portion of the required credit disclosures shall not give such emphasis to any disclosure as to obscure or detract attention from the other credit disclosures.

It is further ordered, That respondent, its successors and assigns, shall forthwith distribute a copy of this order to each of its operating divisions and to each person responsible for or connected with preparation of its television advertisements and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or any other circumstances which may affect any compliance obligation arising out of this order.

It is further ordered, That respondent George Irvin Chevrolet Co., shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8934. Complaint, July 18, 1973—Dismissal Order, Sept. 16, 1981

This order dismisses without prejudice the Commission's July 18, 1973 complaint charging eight major oil companies with maintaining and reinforcing a non-competitive market structure in the refining of crude oil into petroleum products. Upon agreement between complaint counsel and respondents that the matter cannot be resolved in the foreseeable future, the Commission concluded that pending proceedings were not in the public interest. The order also vacates the ALJ's January 5, 1977 Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979; and bars the Commission from disclosing documents and information protected by these orders to any unauthorized party, or pursuant to an FOIA request. Upon dismissal of the complaint, the agency is additionally required to place respondents' documents, received pursuant to discovery in Docket 8934, in the physical possession of a designated custodian to be accorded the protections provided by Section 21 of the FTCA.

Appearances

For the Commission: *John A. Woodstock, Marc G. Schildkraut, Daniel P. Ducore, Arthur J. Nolan, Rhett R. Krulla, David C. Dickey, Gregory M. Fox, James M. Giffin, Oleta J. Harden, Eugene Higgins, Charles A. James, Jeff Jacobovitz, Patrick J. O'Brien, Mark L. Rosenberg,* and *Constance M. Salemi.*

For the respondents: *Robert E. Jordan III, Richard H. Porter* and *F. Michael Kail, Steptoe & Johnson,* Washington, D.C., and *Edward E. Vaill,* in-house Litigation Counsel, Los Angeles, Calif., for Atlantic Richfield Co., *William Simon* and *Robert G. Abrams, Howrey & Simon,* Washington, D.C., and *Charles W. Mathews,* in-house counsel, Houston, Tex., and *A.P. Lindemann, Jr.,* in-house counsel, New York City, for Exxon Corp., and *John E. Bailey,* Assistant General Counsel, and *Morgan L. Copeland,* in-house counsel, Houston, Tex., for Gulf Oil Corp., and *Andrew J. Kilcarr* and *Vincent Tricarico, Donovan Leisure Newton & Irvine,* Washington, D.C., and *Charles F. Rice,* in-house counsel, New York City, for Mobil Oil Corp., and *William R. Jentes* and *Tefft W. Smith, Kirkland & Ellis,* Chicago, Ill., and *M.J. Keating, Paula J. Clayton,* and *Jeffrey R. Harder,* in-house counsel, Chicago, Ill., for Standard Oil Co. (Indiana), and *George A. Sears, Richard W. Odgers,* and *Roland W. Selman, Pillsbury, Madison & Sutro,* San Francisco, Calif., for Standard Oil

Co. of California, and *J. Wallace Adair* and *Frederick S. Frei, Howrey & Simon,* Washington, D.C., and *Chester D. Walz, Jr.,* in-house counsel, Houston, Tex., for Shell Oil Co., and *Milton Handler, Milton J. Schubin,* and *Barry Willner, Kaye, Scholer, Fierman, Hays & Handler,* New York City, and *Robert D. Wilson* and *Sharon S. Jacobs,* in-house counsel, White Plains, N.Y., for Texaco, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. RESPONDENTS

1. Respondent Exxon Corporation (Exxon) is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office and place of business at 1251 Avenue of the Americas, New York, New York. Exxon is the nation's largest corporation with assets in 1972 exceeding $21.5 billion. In 1972 its sales exceeded $20 billion—second in the nation. Exxon is the nation's largest petroleum company.

2. Texaco Inc. (Texaco) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 135 East 42nd St., New York, New York. Texaco is the nation's third largest corporation with assets in 1972 exceeding $12 billion. In 1972 its sales exceeded $8.6 billion—eighth in the nation. Texaco is the nation's second largest petroleum company.

3. Gulf Oil Corporation (Gulf) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at the Gulf Building, Pittsburgh, Pennsylvania. Gulf is the nation's sixth largest corporation with assets in 1972 exceeding $9.3 billion. In 1972, its sales exceeded $6.2 billion—eleventh in the nation. Gulf is the nation's third largest petroleum company.

4. Mobil Oil Corporation (Mobil) is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business at 150 East 42nd St., New York, New York. Mobil is the nation's seventh largest corporation with assets in 1972 exceeding $9.2 billion. In 1972 its

sales exceeded $9.1 billion—seventh in the nation. Mobil is the nation's fourth largest petroleum company.

5. Standard Oil Company of California (Standard of California) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at the Standard Oil Building, 225 Bush St., San Francisco, California. Standard of California is the nation's ninth largest corporation with assets in 1972 exceeding $8 billion. In 1972 its sales exceeded $5.8 billion—twelfth in the nation. Standard of California is the nation's fifth largest petroleum company.

6. Standard Oil Company (Indiana) (Standard of Indiana) is a corporation organized, existing and doing business under the laws of the State of Indiana with its principal office and place of business at 910 South Michigan Ave., Chicago, Illinois. Standard of Indiana is the nation's twelfth largest corporation with assets in 1972 exceeding $6.1 billion. In 1972 its sales exceeded $4.5 billion—fifteenth in the nation. Standard of Indiana is the nation's sixth largest petroleum company.

7. Shell Oil Corporation (Shell) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at One Shell Plaza, Houston, Texas. Shell is the nation's fourteenth largest corporation with assets in 1972 exceeding $5.1 billion. In 1972 its sales exceeded $4 billion—seventeenth in the nation. Shell is the nation's seventh largest petroleum company.

8. Atlantic Richfield Company (Atlantic Richfield) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at 717 Fifth Ave., New York, New York. Atlantic Richfield is the nation's sixteenth largest corporation with assets in 1972 exceeding $4.6 billion. In 1972 its sales exceeded $3.3 billion—twenty-fifth in the nation. Atlantic Richfield is the nation's eighth largest petroleum company.

9. Other petroleum companies, not named as respondents herein, have engaged in some of the acts and practices alleged herein and have contributed to the noncompetitive structure of the petroleum industry, as hereinafter alleged.

II. THE INDUSTRY

10. The petroleum industry is comprised of five basic levels of operation: the exploration and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of

refined petroleum products and the marketing of refined petroleum products. All respondents are vertically integrated companies and operate at all of the above-mentioned levels.

III. RELEVANT MARKETS

11. For purposes of this complaint, the relevant market is the refining of crude oil into petroleum products and relevant submarkets thereof.

12. For purposes of this complaint, the relevant geographic market encompasses the Eastern and Gulf Coast states, together with parts of the Mid-Continent area of the United States, and relevant submarkets thereof, in which respondents' conduct in maintaining a noncompetitive market, as alleged herein, has operated to prevent free and open competition.

IV. JURISDICTION

13. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, each of the respondents is in substantial competition with each and all of the other respondents and with other petroleum refiners in the refining of crude oil into petroleum products.

14. In the course and conduct of their business, respondents cause and have caused crude oil and petroleum products to be shipped from their facilities in various States to locations in various other States of the United States, and at all times mentioned, maintain and have maintained, a substantial course of trade in crude oil and petroleum products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V. ACTS AND PRACTICES

15. Since at least 1950, respondents, individually and with each other, have maintained and reinforced a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant market.

16. In maintaining and reinforcing the aforesaid noncompetitive market structure, respondents, individually and with each other, have been and are engaged in, among others, the following acts and practices, some of which, *inter alia*, control and limit the supply of crude oil to independent refiners and potential entrants into refining:

(a) Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;

(b) Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;

(c) Pursuing a common course of action of adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;

(d) Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers, and potential entrants into marketing;

(e) Pursuing a common course of action of accomodating the needs and goals of each other in the production, supply and transportation of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;

(f) Pursuing a common course of action of using their vertical integration to keep profits at the crude level artificially high and profits at the refining level artificially low thereby raising entry barriers to refining;

(g) Pursuing a common course of action to abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;

(h) Pursuing a common course of action of accomodating the needs and goals of each other in the transportation and marketing of refined petroleum products to the exclusion or detriment of independent marketers and potential entrants into marketing.

17. Respondents have exercised monopoly power in the refining of petroleum products in the relevant markets by engaging in, among others, the following acts and practices:

(a) Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

(b) Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

(c) Pursuing a common course of action in their marketing practices thereby avoiding price competition in the marketing of refined petroleum products.

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18. Respondents, individually and with each other, have followed and do follow common courses of action in accomodating the needs and goals of each other throughout the petroleum industry thereby increasing the interdependence of respondents and reducing respondents' incentive to behave competitively.

VI. EFFECTS

19. Respondents' acts and practices have had, among others, the following effects:

(a) Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

(b) Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

(c) Actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed.

(d) The normal response of supply to demand for refined petroleum products has been distorted. Shortages of petroleum products have fallen with particular severity on sections of the country where independent refiners and marketers are primarily located.

(e) The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated, thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

(f) Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined product.

(g) Respondents have obtained profits and returns on investments substantially in excess of those that they would have obtained in a competitively structured market.

(h) American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

VII. VIOLATIONS

20. The aforesaid acts and practices constitute a combination or agreement to monopolize refining of crude oil into petroleum

products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

21. Through the aforesaid acts and practices respondents have maintained monopoly power over the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

22. Respondents, individually and with each other, have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

ORDER

I.

On April 24, 1981, the Commission issued an order requesting that the parties brief four specific issues relevant to the status of this case.[1] The order also stayed all proceedings in this matter pending further order by the Commission.

On June 23, 1981, complaint counsel and respondents simultaneously filed initial memoranda in response to the Commission's April 24, 1981, Order. Responsive pleadings were subsequently filed by complaint counsel on July 9, 1981, and by respondents on July 23, 1981.

II.

On July 18, 1973, the Commission issued the complaint in this matter pursuant to Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

On October 31, 1980, complaint counsel filed their "First Statement of Issues, Factual Contentions and Proof," pursuant to a March 12, 1980, Order by Administrative Law Judge James P. Timony. In the interim, the Commission denied motions by respondents to withdraw this matter from adjudication pending the filing of complaint counsel's pleading. *See* June 30, 1980, Order. After reviewing complaint counsel's statement, ALJ Timony concluded in a January 23, 1981, Order that ". . . no issues have been eliminated

[1] The parties were requested to: (1) provide a proposed schedule setting forth dates for the conclusion of all additional discovery, the filing of all pretrial motions, the filing of all pretrial briefs, and the commencement and conclusion of trial; (2) discuss any procedures by which these proceedings may be expedited and/or resolved, in whole or in part; (3) discuss the extent to which the allegations of liability can be further narrowed or consolidated, in whole or in part; and (4) discuss whether there are any other factors bearing on the public interest which the Commission should now address in connection with the status of these proceedings.

from the Pretrial Discovery Statement of February 22, 1974, and the Order Stating Issues of January 9, 1976." Thereafter, on February 2, 1981, respondent Texaco Inc. moved that the Commission dismiss this proceeding in light of ALJ Timony's January 23, 1981, Order.

The Commission's April 24, 1981, Order specifically raised its concern that the issues of fact and law in this case did not appear to have been sufficiently narrowed to accomplish a timely and meaningful resolution of this matter. None of the memoranda filed by the parties pursuant to this Order, however, has presented any evidence to assuage the Commission's initial concerns regarding the status of this matter. Complaint counsel's "best case" model contemplates the filing by each party of three additional Statements of Contentions and Proof over the next thirty-three months and a potential target of approximately three years before trial would commence. (Complaint Counsel's Response at 26–31.) Moreover, complaint counsel state that any further narrowing of the issues at this time would be "arbitrar[y]" and "irresponsible." (Complaint Counsel's Response at 39.) Finally, complaint counsel predict that ". . . it [is] unlikely that continuation of the *Exxon* case can accomplish 'a timely and meaningful resolution' of the violations described in Complaint Counsel's First Statement. Complaint counsel therefore recommend that this matter be dismissed, without prejudice . . . ." (Complaint Counsel's Response at 6.)

Respondents, while specifically declining to address the first three requests of the Commission's April 24, 1981, Order, assert that the proceeding is not in the public interest and therefore should be terminated. (Respondents' Joint Submission at 1–4.) Respondents state that ". . . only a fraction of the discovery that will be necessary to prepare this case for trial has been completed" (Respondents' Joint Submission at 40) and that a "realistic assessment suggests that the case is far closer to its beginning than to its end." (Respondents' Joint Submission at 39.) Respondents conclude that "Docket 8934 should be dismissed." (Respondents' Joint Submission at 49.)

Thus, both complaint counsel and respondents agree that completion of discovery is at least several years away, that this matter cannot be resolved in the foreseeable future and that the complaint should be dismissed. In addition, the parties have agreed that the ALJ's January 5, 1977, Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979, be vacated. This order requires that the documents, obtained during discovery and designated as confidential, be returned at the conclusion of the proceeding.[2]

[2] In an Agreement Between the Parties, filed with the Commission on June 23, 1981, respondents waive the

(Continued)

III.

The Commission has considered the briefs of the parties, submitted in response to its April 24, 1981, Order, together with other filings in this proceeding, submitted or referred to by the parties, specifically including Complaint Counsel's First Statement of Issues, Factual Contentions and Proof, dated October 31, 1980, and the Counterstatements of Respondents, dated March 30, 1981, and has concluded that further proceedings in Docket No. 8934 are not in the public interest. While the length or complexity of litigation does not, in itself, constitute a basis for dismissal, the circumstances of this proceeding, including the limited progress of the litigation, call for this result. This case has been in pre-trial for eight years and unless the issues are substantially narrowed it may be well over three years before trial commences. While the Commission has the authority to remove this matter from adjudication and narrow the issues on its own initiative, such action would be impracticable under the circumstances. Therefore, without reaching the merits of this case, we believe the proper course for the Commission is to dismiss the pending proceedings and to preserve the option of addressing any anticompetitive problems in this industry in more focused proceedings. Accordingly, *it is ordered*, that this matter be dismissed, without prejudice.

It is further ordered, That the Agreement Between the Parties, filed with the Commission on June 23, 1981, is approved by the Commission and that pursuant thereto, the ALJ's Protective Order of January 5, 1977, as modified by the ALJ's Orders of April 23 and June 5, 1979, is vacated. The documents and information covered by these orders will be treated as follows:

1. Except as permitted or authorized by the Federal Trade Commission Act, as amended by the Federal Trade Commission Improvements Act of 1980 (Pub. Law No. 96–252), and the Commis-

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ALJ's January 5, 1977 Protective Order, as modified, provided that the Commission dismisses the complaint and that the Commission's order of dismissal contains the following assurances of confidentiality: (1) except as permitted or authorized by the FTC Act, as amended, the Commission shall not disclose documents received from respondents, or information contained therein, to any person who is not an employee of the Commission; (2) the Commission shall not disclose the documents or information pursuant to any request under the Freedom of Information Act; and (3) upon dismissal of the complaint, the Commission shall designate a custodian who will maintain physical possession of the documents, all of which shall be treated as if they had been designated confidential by respondents at the time of submission and as if they had been duly subpoenaed subject to applicable provisions of the FTC Improvements Act, and the documents shall be protected as provided by Section 21 of the FTC Act and the Commission's implementing Rules of Practice. The agreement also states that respondents do not waive "any restriction imposed by law on the Commission's use or disclosure of [the] . . . documents or information, . . . the right to seek the return of any or all of such documents, or the right to seek additional protection for . . . [the] documents, or information." The documents and information subject to the agreement are exempt from mandatory public disclosure under applicable statutes and case law. See 5 U.S.C. 552.

sion's implementing rules, the Commission shall not disclose documents in the possession of the Commission which were received from respondents, or information contained therein, to any person who is not an employee of the Commission. The Commission shall obtain suitable assurances from all employees afforded access to respondents' documents not to disclose such documents or the information contained therein, except as authorized.

2. The Commission shall not disclose the documents or information contained therein pursuant to any request under the Freedom of Information Act.

3. Upon dismissal of the complaint, the Commission shall designate a custodian pursuant to Section 21 of the Federal Trade Commission Act, as added by Section 13 of the Federal Trade Commission Improvements Act of 1980. The documents in the possession of the Commission which were received from respondents pursuant to discovery in Docket 8934 shall be placed in the physical possession of the custodian, and shall be treated as if they had been designated confidential by respondents at the time of submission and as if duly subpoenaed subject to provisions of the Improvements Act, and shall thereafter be protected as provided by Section 21 and pursuant to the regulations implementing the Act promulgated by the Commission.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to dismiss this case for one reason—as it now stands, it cannot serve a useful public interest. The number and complexity of issues raised by the complaint, the resources and zeal of teams of lawyers from eight major companies, and the need for massive discovery on all sides have made the case unmanageable and have slowed its progress to a crawl. This unfortunate state of affairs, and the Commission's resulting decision to abandon the case, do not necessarily mean that there have not been major problems in the competitive structure and performance of the oil industry. For example, particular areas of concern appear to include pipeline ownership and allocation, joint ventures, and the competitive disadvantages of small independent companies. In addition, there are indications that mergers of competing oil companies may occur more frequently in the future.

If there are such competitive problems, however, we are much

more likely to reach them by focusing on a narrower set of issues in any future proceeding. This case, begun in 1973 and spanning over four administrations, both Democratic and Republican, and five Chairmen, has represented far and away the major commitment of the Commission to this key industry. Conducting it has obligated many of our best lawyers and has prevented the Commission from considering other, narrower oil industry investigations and possible enforcement actions. I have reluctantly concluded that the Commission's enforcement discretion should be exercised by committing our resources to initiatives more likely to provide benefits to the public. Retaining the documents obtained over the history of the case and taking advantage of the expertise gained by our staff concerning every level and significant practice of this industry will help us do just that.

IN THE MATTER OF

TENNECO, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9097. Complaint, March 15, 1977—Final Order, Sept. 23, 1981

This order requires, among other things, a Houston, Texas, corporation to timely divest, in accordance with the terms of the order, all assets and properties constituting the Monroe Auto Equipment Company. The order also prohibits the company from acquiring, for a period of ten years, any enterprise engaged in the manufacture or sale of shock absorbers, without prior Commission approval; and bars any corporate officer or employee owning or controlling more than 1 per cent of Tenneco's assets from acquiring any of the divested stock or assets.

Appearances

For the Commission: *K. Keith Thurman, Layn R. Phillips,* and *Linda C. Martin.*

For the respondent: *John L. Jeffers, Alan Gover,* and *Henry Kollenberg, Baker & Botts,* Houston, Texas, and *David C. Murchison, John DeQ. Briggs III,* and *Bernard Cooney, Howrey & Simon,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Tenneco Inc. (hereinafter "Tenneco") and Monroe Auto Equipment Company (hereinafter "Monroe"), corporations subject to the jurisdiction of the Commission, through taking steps to combine Tenneco and Monroe, have violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); the proposed acquisition by Tenneco of the stock of Monroe, if consummated, would violate Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest; the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C.21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C45(b)) and states its charges as follows:

I. Definitions

1. For the purposes of this Complaint, the following definitions shall apply:

(a) *Exhaust system parts* (hereinafter "ESP") are all exhaust pipes, connecting pipes, tail pipes, mufflers (including "sports" mufflers), resonators and attaching parts for application on automobiles, trucks, buses and farm equipment. [2]

(b) *Shock absorbers* are McPherson strut assemblies, cartridges, and shock absorber kits; steering dampers; and direct-acting, air-adjustable, and spring-assisted shock absorbers for application on automobiles, trucks and buses.

(c) The *replacement market* includes all sales by manufacturers of automotive parts for use as replacement of original equipment parts or of previously replaced parts.

II. Tenneco

2. Tenneco is a corporation organized and doing business under the laws of Delaware, with its principal office at the Tenneco Building, Houston, Texas.

3. In 1975, Tenneco's consolidated operating revenues were $5,630,338,000 and its net income was $342,936,000. As of December 31, 1975, Tenneco had total assets of $6,584,204,000.

4. Tenneco's automotive parts operations are carried on by its Walker Manufacturing Company division (hereinafter "Walker"), which manufactures and distributes a full line of ESP, hydraulic and air jacks, steering dampers (a form of shock absorber), and other parts for passenger cars, light trucks, and heavy duty vehicles in the U.S.

5. In 1975, Walker's worldwide revenues amounted to $303 million with net operating income before taxes of $52.1 million. In 1975, Walker's domestic ESP operations had gross sales of $209.7 million, operating income before taxes of $38.6 million, and a pretax return on investment of 38.7 percent. Walker operated thirteen plants located in the U.S., eleven of which manufactured ESP, and served domestic customers from twenty-two distribution centers.

6. At all times relevant hereto, Tenneco sold and shipped products throughout the U.S. and engaged in commerce within the meaning of the Clayton Act, as amended; and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended. [3]

III. Monroe

7. Monroe is a corporation organized and doing business under the laws of Michigan, with its principal office at International Drive, Monroe, Michigan.

8. Through its fiscal year ended June 30, 1976 ("fiscal 1976") Monroe's business consisted mostly of the manufacture and distribution of shock absorbers, primarily for automotive use. Monroe produces and sells shock absorbers for use on virtually all domestic, and many foreign, makes and models of automobiles. Monroe offers the most complete coverage of truck (light, medium and heavy) and bus shock absorbers. Monroe operates three domestic production facilities which, along with Monroe's corporate headquarters, function as distribution points for its independent aftermarket customers.

9. For fiscal 1976 Monroe had net sales of $174,346,000 and net income of $5,411,000. As of June 30, 1976, Monroe had total assets of $185,854,000. Monroe has experienced a rate of return on its stockholder's equity averaging 21.9 percent after taxes for the ten year period 1965–74. For fiscal 1976, $123.8 million of Monroe's total sales and all of its profits derived from its domestic operations.

10. Monroe is a leading manufacturer and distributor of shock absorbers in the U.S. and worldwide, especially in the replacement markets. Eighty-one percent of its sales in the latest fiscal year were made to the replacement markets. In 1976, Monroe ranked second in the U.S. replacement shock absorber market. Monroe's sales of shock absorbers domestically are made primarily to warehouse distributors (hereinafter "WDs"), but it also sells to chain stores and other private brand accounts and various vehicle producers for resale. Monroe is the largest seller of shock absorbers to WDs. Monroe has a quality product, a known brand name, and a competent force of field salesmen.

11. At all times relevant hereto, Monroe sold and shipped its products throughout the United States, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended. [4]

IV. Agreement Between Tenneco and Monroe

12. On December 20, 1976, Tenneco announced an agreement in principle to acquire Monroe. On December 22, 1976, the Boards of Directors of Tenneco and Monroe approved a proposal for the combination of the two companies to be effected by an exchange of Tenneco common stock for Monroe common stock. Under the

exchange proposal Tenneco would seek to acquire not less than 80 percent of Monroe's common stock. It is anticipated that the proposed acquisition of Monroe by Tenneco will be consummated in March 1977.

V. Nature of Trade and Commerce

A. Market Definitions

13. The relevant geographic market is the U.S. as a whole.

14. The relevant product markets are:

(a) The manufacture and sale of shock absorbers to (1) the U.S. replacement market and (2) the U.S. independent aftermarket.

(b) The manufacture and sale of ESP to (1) the U.S. replacement market and (2) the U.S. independent aftermarket.

15. No practical alternatives exist for shock absorbers and ESP in automotive use.

16. Shock absorbers are an integral part of automotive suspensions. They are responsible to a large degree for the handling characteristics, roadability, safety and comfort of the car. They help to hold a car under control, reduce sway and roll on curves, reduce bottoming, control wheel hop, and smooth the ride.

17. Shock absorbers take three basic forms: McPherson units; steering dampers; and heavy duty, air-adjustable and spring-assisted shock absorbers. Monroe and its principal competitors offer all three forms as a complete shock absorber line. All forms of shock absorbers (1) involve the same basic design and manufacturing technologies; (2) are sold through the same channels of distribution to the same customers; (3) are manufactured by the leading producers of shock absorbers; (4) are installed by the same people; (5) are priced within the same range; and (6) perform the same basic function, to aid in stabilizing the vehicle. **[5]**

18. ESP serve to dissipate engine exhaust fumes and to provide an acceptable noise level.

19. Both shock absorbers and ESP are sold for incorporation into new vehicles during their assembly (original equipment installation, hereinafter "OE") and for replacement of worn out or damaged units on existing vehicles. The replacement market is distinct from the OE market. Prices of parts sold to the OE market are significantly lower than those sold to the replacement market. There is no cross elasticity of demand between the OE and replacement markets. Demand for OE parts is a function of vehicle production; demand for

replacement parts varies with a number of factors, including wear, failure, and desired upkeep by users.

20. The replacement markets for shock absorbers and ESP are divisible into two submarkets: the service market; and the independent aftermarket. The service market consists of sales made to vehicle producers for resale to their dealers, plus sales by vehicle producers of parts of their own manufacture to their dealers. The independent aftermarket encompasses all other replacement sales, but excludes those sales made to other manufacturers of the same product.

21. Manufacturers of shock absorbers and ESP recognize that the service market and the independent aftermarket are distinct submarkets, utilizing separate sales forces and distinct sales programs. To serve the independent aftermarket for shock absorbers and ESP, it is necessary to have a stock of parts at various distribution points around the country. Such distribution facilities are not necessary to supply the service market inasmuch as the customers themselves already possess a distribution system for parts.

B. Market Structure

(i) Shock Absorbers

22. Sales of shock absorbers to the replacement market in 1975 totalled approximately 51.6 million units, having a value of $312 million. Sales of shock absorbers to the independent aftermarket in 1975 were 47.5 million units, with an approximate value of $288 million. **[6]**

23. Monroe's total sales of shock absorbers to the replacement market during fiscal 1976 exceeded 18.3 million units with a value in excess of $102 million, and accounted for 33 percent of total industry shipments to that market. Monroe's fiscal 1976 shipments of 17.5 million units represented 34 percent of the 51.7 million units (valued at approximately $301 million) shipped to the independent aftermarket.

24. In calendar 1976 Walker sold $2.5 million or approximately 0.8 percent of total industry sales of shock absorbers to the replacement market.

25. Concentration in the sale of shock absorbers to the replacement market and the independent aftermarket is extremely high.

(ii) Exhaust System Parts

26. In 1975, gross sales of ESP totalled approximately $525

million to the replacement market and $473 million to the independent aftermarket.

27. Walker's sales of ESP to the replacement market in 1975 were approximately $188 million, which represented 36 percent of industry sales. Walker's sales of ESP to the independent aftermarket in 1975 were approximately $184.4 million, which represented a 39 percent share of such sales.

28. Concentration in the sale of ESP to the replacement market and the independent aftermarket is extremely high.

(iii) Barriers to Entry

29. The barriers to entry into the sale of shock absorbers and ESP to the replacement market and the independent aftermarket are very high.

30. To enter into the sale of shock absorbers or ESP to the replacement market, a firm must make a substantial investment in plant and equipment. To enter the independent aftermarket portion of the replacement market, a firm also needs warehousing facilities and inventory; sufficient financial resources to meet seasonal requirements; a substantial marketing organization, including a large national sales force; and the ability to grant a variety of extended payment terms to customers. [7]

31. There are large economies of scale in the production both of shock absorbers and of ESP.

32. Holdings of U.S. and foreign patents provide current producers of shock absorbers and ESP with an absolute cost advantage over potential entrants. Monroe, in particular, benefits from its patent rights in shock absorbers. As of December 29, 1976, Tenneco held 194 unexpired patents including design patents on exhaust system items or their manufacture.

33. The leading sellers of shock absorbers and ESP to the replacement market and the independent aftermarket have developed a high degree of product differentiation. This differentiation has resulted from the use of extensive field sales forces to promote the products at all levels of distribution and substantial advertising and promotional expenditures.

34. To compete successfully in the independent aftermarkets, it is necessary to offer a full line of shock absorbers or of ESP, fitting most vehicles sold in the U.S. A firm must distribute nationally, and be able to fill orders in a relatively short period of time. As of 1974, it took more than 5,000 shock absorber part numbers and a like number of ESP part numbers to fulfill the needs of the replacement market for most vehicles made or sold in the U.S.

C. Compatibility of Shock Absorbers With Walker Product Lines

35. The sale of shock absorbers in conjunction with ESP offers advantages from marketing and manufacturing viewpoints. Such advantages arise from an identity of marketing channels and methods, and from common manufacturing methods. Tenneco and Walker have recognized shock absorbers to be the product line most compatible with ESP.

36. Shock absorbers are distributed through the same channels as ESP, from manufacturer to consumer. Shock absorbers are typically installed in exhaust system repair shops. The two products represent "under-the-car" service items, subject to the same environmental and repair conditions. Both ESP and shock absorbers are sold to the same customers by utilizing similar selling programs, discount structures, and financing arrangements. [8]

37. Shock absorbers and ESP can be combined in one distribution and delivery system. They have been marketed together by Walker, Maremont, and Questor to retail and mass merchandiser marketing channels. Both products are stored jointly by their manufacturers, including Walker, in regional warehouses. If the acquisition of Monroe is consummated, Walker proposes a unified distribution system for both shock absorbers and ESP.

38. Technological similarities exist in the manufacture of shock absorbers, and ESP and jacks. Most shock absorber components could be made by Walker's jack and exhaust system manufacturing equipment.

39. The manufacture of shock absorbers requires a knowledge of hydraulics. Walker possesses a knowledge of hydraulics, both fluid and air, from its experience in manufacturing jacks. There are also similarities in research and development technology between shock absorbers, and ESP and jacks.

VI. Walker's Entry Into Shock Absorbers

40. Starting as early as 1967, Walker has sought toehold acquisition entry into the manufacture and sale of shock absorbers to the replacement market. At that time, Walker had acquisition talks with Armstrong Equipment Ltd. (hereinafter "Armstrong"), a British manufacturer of shock absorbers for both the OE and replacement markets. Armstrong had shock absorber manufacturing subsidiaries in Australia, Canada, and South Africa, and a marketing organization for shock absorbers in the U.S.

41. Early in 1973, Walker considered acquiring Tropic Industries, a company which produced a self-adjusting shock absorber.

42. In May 1974 Walker commenced acquisition talks with Triple S Industries (hereinafter "Triple S"), a manufacturer of steering dampers. [9]

43. In May 1974 Triple S was experimenting with the Terramatic principle, which allows consolidation and reduction of the number of different shock absorbers required to serve the replacement market. Major automakers and Walker believed the Terramatic principle had great potential.

44. On October 15, 1974, Walker acquired Triple S and rights to use the Terramatic principle. Throughout their consideration of the Triple S purchase, Walker and Tenneco anticipated that this acquisition would provide a significant entry into the replacement shock absorber market. Subsequent to its acquisition of Triple S, Walker has continued to expand in the replacement shock absorber market.

45. Additional toehold acquisitions to assist Walker's expansion in the shock absorber replacement market have been and are available. Even subsequent to the purchase of Triple S, Walker has had discussions regarding the possible acquisition of leading European shock absorber manufacturers, including Armstrong and De Carbon.

46. Tenneco and Walker have made a significant commitment at their decisional levels to effect entry, either *de novo* or by toehold acquisition, to the manufacture and sale of shock absorbers for the domestic replacement market and the domestic independent aftermarket. Walker is one of the few firms likely to become a major factor in the U.S. replacement shock absorber market either by internal development or by additional toehold acquisitions. It is probable that such expansion by Walker would have a procompetitive effect and would result in deconcentration of the shock absorber replacement market and independent aftermarket.

47. Tenneco and Walker have been perceived as potential entrants into the shock absorber replacement market and independent aftermarket. It is probable that this perception has prompted a procompetitive effect in that market.

VII. Monroe Is One Of Few Likely Entrants Into ESP

48. Monroe has sought to expand into other automotive products sold in the replacement market to capitalize on its distribution channels and experience. ESP met or exceeded all of Monroe's developed criteria for diversification. [10]

49. One means Monroe considered for diversification into ESP

was through acquisition. In 1974 Monroe sought to acquire Arvin Industries, Inc. (hereinafter "Arvin"), a small producer of replacement ESP.

50. Monroe has the ability to expand a toehold ESP producer into a significant factor in the ESP replacement market and the independent aftermarket.

51. Of the major shock absorber sellers to the replacement market only Monroe does not currently manufacture or sell ESP. Common manufacturing and distribution of shock absorbers and ESP, make shock absorber producers the most likely entrants into the replacement ESP market.

52. It is probable that entry by Monroe into the production and sale of ESP would result in deconcentration of the ESP replacement market and independent aftermarket.

VIII. Effects

53. The effects of the steps taken by Tenneco to acquire Monroe constitute an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended; and the proposed acquisition by Tenneco of Monroe, if consummated, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, and constitute an unfair act and practice in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Actual competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket will be eliminated.

(b) Potential competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket will be eliminated; furthermore, the potential for substantial deconcentration as a result of Tenneco's independent expansion into those markets will be eliminated. [11]

(c) Potential competition between Monroe and Tenneco and between Monroe and other producers of ESP for domestic sale to the replacement market and the independent aftermarket will be eliminated; furthermore, the potential for substantial deconcentration as a result of Monroe's independent or toehold entry into those markets will be eliminated.

(d) The dominant position of Monroe in the domestic sale of shock

absorbers to the replacement market and the independent aftermarket will be strengthened.

(e) The dominant position of Tenneco in the domestic sale of ESP to the replacement market and the independent aftermarket will be strengthened.

IX. Violations Charged

54. The steps taken by Tenneco and Monroe to combine the two companies constitute a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

55. The proposed acquisition by Tenneco of Monroe, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

Initial Decision by

Thomas F. Howder, Administrative Law Judge

May 27, 1980

Preliminary Statement

The Commission's complaint in this case, issued March 15, 1977, charges respondent Tenneco Inc. ("Tenneco") with violating Section 7 of the Clayton Act by acquiring Monroe Auto [2]Equipment Company ("Monroe").[1] Specifically, it was alleged that by virtue of the merger:

(1) Actual competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket has been eliminated;

(2) Potential competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket has been eliminated; furthermore, the potential for substantial deconcentration as a result of Tenneco's independent expansion into those markets has been eliminated;

(3) Potential competition between Monroe and Tenneco and between Monroe and other producers of exhaust system parts ["ESP"] for domestic sale to the replacement market and the

[1] Violation of Section 5 of the FTC Act was also alleged.

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independent aftermarket has been eliminated; furthermore, the potential for substantial deconcentration as a result of Monroe's independent or toehold entry into those markets has been eliminated;

(4) The dominant position of Monroe in the domestic sale of shock absorbers to the replacement market and the independent aftermarket will be strengthened; and

(5) The dominant position of Tenneco in the domestic sale of ESP to the replacement market and the independent aftermarket will be strengthened.

The complaint was issued prior to the actual merger. Upon its issuance, the Commission initiated an action for injunctive relief in the U.S. District Court for the District of Columbia. Based on its consideration of the parties' papers, various depositions and oral arguments of counsel, the court denied the Commission's application. 433 F.Supp. 105 (D.D.C. 1977) (18-page opinion). The merger was thereafter consummated in July 1977 (*See* Finding 24, *infra*). Later, by order of February 7, 1978, issued by then-assigned ALJ Needelman, the complaint was amended to reflect the fact of the merger.[2] [3]

Prehearing conferences were held in Washington, D. C. on May 18, 1977, January 4, 1978 and April 25, 1978. Following the completion of discovery and exchange of trial briefs, hearings were commenced in Washington, D. C., on June 12, 1978. Trial of this case lasted from June 12, 1978, until August 29, 1979, and consumed almost 120 hearing days. A transcript of over 13,300 pages was created, and several hundred exhibits were received in evidence. In their case-in-chief, presented from June 12 through June 23, 1978, complaint counsel called 10 witnesses; respondent's defense presented from July 10, 1978, through February 2, 1979, included 36 witnesses; the rebuttal case of complaint counsel lasted from February 12 through April 30, 1979, and included the testimony of 11 witnesses; and respondent's surrebuttal was presented from April 30 through August 9, 1979, and included the testimony of six witnesses.[3]

The record was closed on November 23, 1979, following the resolution of a number of problems regarding exhibits, *in camera* materials and extensive transcript corrections. Proposed findings were simultaneously filed by the parties on December 21, 1979, and reply findings on January 31, 1980.

Any motions not heretofore or herein specifically ruled upon,

[2] The amended complaint does not include Monroe as a named respondent.

[3] Appendix A to respondent's proposed findings contains a list of the witnesses and indicates the location of their testimony in the transcript.

either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

Certain abbreviations, including the following, are used in this decision:

Tr.	–	Transcript of testimony.
CX	–	Commission's exhibit.
CPX	–	Commission's physical exhibit.[4]
CPF	–	Complaint counsel's proposed finding.
CRPF	–	Complaint counsel's reply proposed finding.
RX	–	Respondent's exhibit.
RPX	–	Respondent's physical exhibit.
RPF	–	Respondent's proposed finding.
RRPF	–	Respondent's reply proposed finding.

The transcript of testimony is usually referred to with the last name of the witness and the page number or numbers upon which the testimony appears.

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings:

Findings of Fact

I. Tenneco

1. Respondent Tenneco Inc. ["Tenneco"] is a corporation organized and doing business under the laws of Delaware. Its principal office is The Tenneco Building, Houston, Texas (Complaint and Answer, ¶2; CX 106).

2. Tenneco is a conglomerate company with diversified manufacturing and distributing operations in farm and construction equipment, shipbuilding, petroleum, chemicals, packaging and automotive parts. Tenneco also has interests in agriculture and in land development (CX 2A–C; CX 2 pp.8–9, 12–20).

3. In 1975, Tenneco was the 15th largest industrial corporation in the United States with total assets of $6,584,204,000.[4] Tenneco's 1975 net income of $342,936,000 was 18th largest and its consolidated operating revenues of $5,630,330,000 were 22nd largest among industrial corporations in the United States (Complaint and Answer ¶3, CX 192B).

4. Until 1977, Tenneco's automotive parts operations **[5]**were carried on by its Walker Manufacturing Division ["Walker"], which manufactured and distributed a full line of exhaust system parts[5] for passenger cars, light trucks, and heavy-duty vehicles in the United States. The production and sale of ESP accounted for and still accounts for a majority of Walker's revenues (Complaint and Answer, ¶4; Cook 1570–72, 1646; RPF 9).

5. The Mechanex Corporation ["Mechanex"] was part of Walker and a Tenneco subsidiary before the Monroe acquisition. Mechanex distributed steering stabilizers or dampers under the brand name of Steerline, as well as other automotive products for application on passenger cars, light trucks and heavy-duty vehicles (CX 43A–H; CX 44A–F; CX 173A; CX 208K, Admission No. 24; CX 339A–B; Prescott 11,281).

6. Walker began business as a jack and lifting device manufacturer in approximately 1912 and currently manufactures a wide variety of jack products including jack stands, hydraulic and air jacks, mechanical scissors jacks and various other associated accessories and components (Complaint and Answer, ¶4; CX 27R; CX 140; Uhen 1866). In recent years Walker has also manufactured and distributed a line of automotive filters, including air, oil and gasoline filters (CX 106B).

7. In 1975, Walker's worldwide revenues were $303 million, with net operating income before taxes of $52.1 million (Complaint and Answer ¶5).

8. In 1975, Walker's domestic ESP operations had gross sales of $209.7 million, operating income before taxes of $38.6 million, and a pretax return on investment of 38.7%. Walker documents project similar rates of return through 1981 (CX 26B).

9. In 1975, Walker operated 13 manufacturing and/or distribution facilities in the United States (Complaint and Answer, ¶5; CX 208I, Admission No. 19; RX 233; Schultz 1791–92). Of these, ten were ESP facilities:

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[4] This ranking is measured in terms of total assets as of December 31, 1975.

[5] ESP is defined in Finding 55, *infra*.

Location of Walker ESP Manufacturing Facilities

(1) Walker Mississippi Division Aberdeen, Mississippi
(2) Walker North Carolina Division Arden, North Carolina [6]
(3) Walker Texas Division Greenville, Texas
(4) Walker Virginia Division Harrisonburg, Virginia
(5) Walker Michigan Division Jackson, Michigan
(6) Walker Ohio Division Hebron, Ohio
(7) Walker Wisconsin Division (manufacturing only) Racine, Wisconsin
(8) Walker Nebraska Division Seward, Nebraska

(CX 208I, Admission No. 19; RX 233).

Location of Walker ESP Distribution Centers (no manufacturing)

(1) Walker Mid-West Distribution Center Batavia, Illinois
(2) Walker Western Distribution Center Salt Lake City, Utah

(CX 208J–K, Admission No. 21).

10. At the time of Monroe's acquisition by Tenneco, Walker also distributed ESP from 22 field warehouses located throughout the U.S.

(1) Atlanta, Georgia
(2) Baltimore, Maryland
(3) Buffalo, New York
(4) Chicago, Illinois
(5) Dallas, Texas
(6) Denver, Colorado
(7) Elizabeth, New Jersey
(8) Hayward, California
(9) Indianapolis, Indiana
(10) Los Angeles, California
(11) Medford, Massachusetts
(12) Minneapolis, Minnesota
(13) Monroeville, Pennsylvania
(14) Omaha, Nebraska
(15) Philadelphia, Pennsylvania
(16) Phoenix, Arizona
(17) Portland, Oregon
(18) Riverside, Missouri
(19) St. Louis, Missouri [7]
(20) Seattle, Washington
(21) Springfield, Massachusetts
(22) Warren, Michigan.

(CX 208I–J, Admission No. 20).

11. During 1975, in addition to ESP, Walker stocked shock absorbers in the Buffalo, New York; Chicago, Illinois; and Indianapolis, Indiana field warehouses and certain distribution centers in the U.S. for resale to muffler installation shops (CX 208K, Admission Nos. 22–23).

12. Before it purchased Monroe, Tenneco acquired and presently operates various muffler shops which install ESP and sometimes shock absorbers in Canada and in Europe (CX 4I; CX 27P; Cook 1698–99; Fleuelling 5815–17; Ashford 11,511). In 1962, Walker acquired Speedy Muffler King, Inc., a chain of four or five muffler installation shops in Canada (Putman 1140, 1211; Cook 1654). By 1975, Walker had expanded Speedy Muffler King's market area from Montreal and Toronto west to Vancouver, British Columbia (CX 2C; Putman 1211). By 1978 there were 70–75 Speedy Muffler King outlets operating in Canada[6] (CX 2; CX 25K; Putman 1140, 1145; Cook 1653–54). Walker plans substantial expansion in the number of

[6] By December 31, 1978, there were six Speedy Muffler King outlets in the northeastern United States (CX 349 p.16).

its muffler shops, particularly in the U.S. market (Nelson 9861–65 *in camera,* 9866; Cook 1651–52 *in camera*).

II. Monroe

13. Prior to being acquired by Tenneco, Monroe was a corporation organized and doing business under the laws of Michigan with its principal office at International Drive, Monroe, Michigan 48161 (Complaint and Answer ¶7).

14. In fiscal 1976 (July 1, 1975—June 30, 1976) Monroe had net sales of $174,346,000, net income of $5,411,000, and total assets of $185,854,000 (Complaint and Answer ¶9).[7] **[8]**

15. In fiscal 1976, $128.8 million of Monroe's total sales and virtually all of its profits were derived from its domestic operations; the company's foreign shock absorber operations taken as a whole were not profitable (CX 141C–D; CX 151E; *see* CX 3K; CX 4S; CX 21B; CX 22).[8]

16. Monroe, which has traditionally been a one product company,[9] began to manufacture shock absorbers before World War II (RPF 13). It became and presently remains a leading manufacturer and distributor of shock absorbers in the United States and worldwide. Monroe is considered to have a high quality product, a known brand name, and a competent force of salesmen.

17. Monroe sells shock absorbers for use on virtually all domestic and many foreign makes of automobiles. (CX 4Q; CX 143K). Monroe's domestic sales of shock absorbers are made primarily to warehouse distributors ["WDs"], but it also sells to chain stores, other private brand accounts and various vehicle producers for resale (Complaint and Answer ¶10). In fiscal 1976, 81% of Monroe's sales worldwide were to the replacement market (Complaint and Answer ¶10).

18. Overseas, Monroe and its affiliates operated shock absorber plants in Belgium, Brazil, Argentina, Spain and Canada (CX 208F, Admission No. 14; Barbeau 4695). Domestically, the company operated three shock absorber plants, which also functioned as distribution facilities:

1. Hartwell, Georgia

[7] In fiscal 1972 (July 1, 1971—June 30, 1972), Monroe was the 683rd largest industrial corporation in the United States in terms of net sales, with consolidated net sales of $127,521,954 (CX 144 p.6 *citing* Fortune Magazine Directory of the 1,000 largest U.S. industrial companies; CX 145 p.8). It ranked 255th largest in terms of net income with only six industrial corporations surpassing Monroe in net income as a percent of sales (CX 144 p.6 *citing* Fortune Magazine Directory of the 1,000 largest U.S. industrial companies).

[8] Monroe experienced a rate of return on its stockholder's equity averaging 21.9% after taxes for the ten year period 1965–74 (Complaint and Answer ¶9). In 1976, Monroe's earnings had dropped from the 1973 levels of 12.4% of revenues and 15.3% of equity to 3.1% of revenues and 4.3% of equity (CX 4D).

[9] Monroe introduced an oil filter in 1975 to diversify its product line (CX 141 p.9; CX 141F; CX 142E).

2. Cozad, Nebraska
3. Paragould, Arkansas

(Complaint and Answer, ¶8; CX 208E, Admission No. 8; Hegel 1975).

19. Monroe distributed shock absorber products, including steering dampers, from its Reno, Nevada, Hartwell, Georgia and Cozad, Nebraska facilities. Automotive oil filters were distributed from all of the above except the Reno, Nevada facility (CX 171A–B). [9]

III. Jurisdiction

20. It is not disputed that, since at least 1975, both Monroe and Tenneco sold and shipped products throughout the United States and engaged in commerce within the meaning of the Clayton Act, as amended; and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended (Complaint and Answer, ¶¶6, 11).

IV. Acquisition of Monroe

21. On December 20, 1976, following negotiations, Tenneco announced an agreement in principle to acquire Monroe.[10] On December 22, 1976, The Board of Directors of Tenneco approved a proposal for the combination of the two companies to be effected by an exchange of Tenneco common stock for Monroe common stock. Under the exchange proposal, Tenneco sought to acquire not less than 80% of Monroe's common stock (Complaint and Answer ¶12).

22. The merger was consummated on July 29, 1977 through an exchange of one share of Tenneco common stock for each 2.6 shares of Monroe[11] (CX 106A; CX 202 p.2).

23. Following the merger, Monroe Auto Equipment and Walker Manufacturing became operating units of Tenneco Automotive, which now oversees the activities of Walker, Monroe and the Speedy Muffler King unit for U.S. operations (CX 202, p.2; CX 349 p.16).

V. Relevant Geographic Markets

24. There is no dispute that the relevant geographic market for both ESP and shock absorbers is the United States as a whole[12] (Complaint ¶13; RPF n.6; *See* Nelson 9663, 10,716). [10]

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[10] Tenneco's prior interest in Monroe is discussed in Findings 385–87, *infra*.

[11] On July 29, 1977, Monroe was merged into the wholly owned subsidiary of Tenneco which held the shares of Monroe stock acquired pursuant to the offer (Respondent's Trial Brief p.5).

[12] There are no regional variations in the prices of replacement shock absorbers or ESP (CX 208N, Admission No. 43; Kalupa 3654, 4190, 4196; Robison 3691; Luyckx 3746; Fleuelling 4115, 5159–60; Foster 5105–06 *in camera*, 7233–35 *in camera; see* Nelson 9633, 10,561, 10,716–17).

VI. Relevant Product Markets

A. Shock Absorbers

25. Shock absorbers are products that have virtually no substitutes for use on motorized vehicles (CX 208"O", Admission No. 44).

26. Shock absorbers are an integral part of automotive suspension systems and are responsible to a large degree for the handling characteristics, roadability, safety and comfort of vehicles (Complaint and Answer ¶16; CX 15A; CX 309B). The specific function of a shock absorber is ". . . to diminish or hopefully, eliminate any of the subsequent movements of the [vehicle's] body after the tire or tires have negotiated the bump in the road" (Hegel 1931). Shock absorbers fulfill their function by converting mechanical energy to thermal energy and then releasing it to the atmosphere (Hegel 1932; *see* CX 220Z–8). Thus, shock absorbers help hold a car under control at all times by keeping the wheels on the road, reducing sway and roll on curves, reducing bottoming, dampening vibrations, controlling wheel hop, as well as smoothing the ride (CX 15A, CX 208 "O", Admission No. 47; CX 220Z–8–10; Hegel 1931; Tompkins 2316).

27. In order to meet specific requirements, shock absorbers take various forms, including direct-acting or conventional shocks,[13] air-adjustable, spring-assisted, steering dampers and MacPherson struts[14] (CX 15A–C; CX 99; CX 168A–B; CX 169A–G; CX 175; CX 189; Hegel 1943–44; Diggelman 2525; Fleuelling 4104, 4118; Nelson 9665, 9729).

28. Shock absorbers have been recognized as distinct products by the Census of Manufacturers (CX 190G–H). The Motor Equipment Manufacturers' Association ["M.E.M.A."] *Quarterly Product Trend Report* breaks down unit replacement sales of shock absorber manufacturers into the following categories; direct acting, air-adjustable, spring-assisted and MacPherson struts and cartridges (CX 162A; Fleuelling 1404–05). Employees or agents of Monroe participated in the formation of M.E.M.A. shock absorber reporting categories and Monroe relies on M.E.M.A. data (CX 208Z–13, Admission No. 173; Kalupa 3560–61; Fleuelling 4098–5105). [11]

29. A MacPherson strut[15] is considered as and referred to as a form of shock absorber by members of the industry (Givens 429–30; Hegel 1943–44, 1950–51; Diggelman 2525, 2555; Robison 3761; Fleuelling 4104, 4118; Joines 9115; Garfinkel 9105; Stewart 9243–44).

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[13] Shock absorbers come in a range of sizes including the most common 1" and 1 3/16". *See, e.g.*, RX 52 A–D.

[14] MacPherson struts and steering dampers are discussed in greater detail in Findings 29–41 and 42–47 *infra*.

[15] Named after a certain Mr. Earl S. MacPherson, a former employee of GM and Ford in the 1940's and 1950's, who first conceived the idea of and obtained a patent "on a suspension arrangement similar to what we now call a MacPherson strut" (Hegel 1960).

30. A MacPherson strut[16] may be characterized as a shock absorber which also incorporates some structural components of the suspension system (RX 555A–C, *in camera;* Givens 429–30; Hegel 1953–54; H. Wright 3815, 3838; Cox 4408–09; *but see* N. Wright 11,805).

31. MacPherson strut units perform the same damping[17] function for automotive suspensions as does a conventional shock absorber (RX 555A *in camera;* Givens 429–30; Hegel 1950–53; H. Wright 3815; Cox 4408–09; Garfinkel 9205).

32. The strut assembly consists of a hydraulic cartridge plus attaching and positioning parts (Givens 439–40; Hegel 1950–52). The hydraulic cartridge of a MacPherson strut is similar in its design, basic parts, and function to other types of shock absorbers (CX 189; Hegel 1952–53, 1955, 1961–62, 2104; H. Wright 3779, 3815; Cox 4408–09).

33. Both conventional shock absorbers and MacPherson struts use pressure chambers and piston rods (CX 189; Hegel 1950–52). In the case of Monroe and Woodhead, for example, the same sized pressure chamber and piston rod are used in the MacPherson strut cartridges these companies produce as in the $1^{3}/_{16}$" conventional shock absorber. MacPherson strut units involve much of the same manufacturing technology as is used in producing shock absorbers (CX 208P, Admission No. 51).

34. There was testimony that a firm which manufactures hydraulic cartridges for MacPherson struts would not find it [12] technically difficult to produce the remainder of the strut components (Cox 4409–10).

35. MacPherson units are designed for use on smaller automobiles, and have become original equipment on such makes as Volkswagen, Toyota, Datsun, Capri, Colt, Mazda, Honda, Porsche, BMW as well as certain GM, Ford and Chrysler cars (CX 172A–B, L; CX 280"O"–P, Admission No. 48; RX 555B–C *in camera;* Hegel 1947, 1961; H. Wright 3779). While conventional direct-acting shocks are still standard or original equipment on most American cars, there was evidence that vehicle manufacturers may use MacPherson assemblies on the smaller new cars of the future, where space is a prime consideration (CX 98F; RX 555A–C *in camera;* H. Wright 3779, 3842; Bracken 4312; Garfinkel 9205).

36. Consequently, there is a trend toward increased use of MacPherson struts in cars manufactured in the United States (Pond

[16] *See* CX 243, which is a marked copy of RX 381, for a diagram of a MacPherson strut. See CX 242, which is a marked copy of RX 380, for a diagram of Ford's Hybrid strut. For purposes of this case the Hybrid will be considered a type of MacPherson strut.

[17] *See* Finding 26, *supra.*

862; Hegel 7270; *Compare* Hegel 2120, 2122–23 *with* Freeman 8863 *in camera* and H. Wright 3823 *in camera*).

37. The same engineers at Monroe, GM, Bilstein and Woodhead are responsible for both MacPherson strut and shock absorber design (RX 555B *in camera;* Hegel 2104; Petzsch 2466; Cox 4416). Some U.S. shock absorber manufacturers have developed the in-house ability to design and produce MacPherson strut assemblies, or at least prototypes.[18]

38. MacPherson units can be serviced in one of three ways: using MacPherson shock absorber repair kits, inserting MacPherson cartridges or replacing entire strut assemblies (CX 44D; CX 169C; CX 172A; CX 223Z–55; Hegel 1961–63).

39. Firms which manufacture both conventional shock absorbers and MacPherson units or cartridges include: Monroe, Maremont, Delco Division of General Motors, Questor, Ford, Armstrong, Kayaba, Tokiko, ITT, Boge, Woodhead, Fichtel & Sachs, [13]Cofab and Bilstein.[19]

40. Manufacturers that sell MacPherson struts or replacement cartridges to the U.S. replacement market generally also sell at least one other type of shock absorber.[20]

41. Monroe began marketing MacPherson strut cartridges to the U.S. replacement market in approximately 1973 (CX 145E; CX 144D; Hegel 1961).

42. A steering damper,[21] like a shock absorber, is a hydraulic device (CX 282A; CX 294B–C). Steering dampers are, however, installed in a horizontal position while shock absorbers are generally installed vertically.

43. A steering damper is considered and referred to as a form of shock absorber by members of the industry.[22]

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[18] For example, GM designed and produces its MacPherson strut in-house (RX 555B *in camera*). Monroe has designed, and made prototypes of MacPherson struts and recently won a contract to supply strut assemblies without the spring on the top to Chrysler (DeLisle 11,267–68; Ashford 11,540). Maremont has produced MacPherson struts in the United States since 1975 (Stewart 9264). Ford has more than ten years of experience with MacPherson struts in their German made cars and presently manufactures Hybrid strut assemblies in the U.S. (Tompkins 2319; H. Wright 3807, 3836).

[19] CX 84C; CX 143G; CX 144D; CX 151A–B; CX 154A–C; CX 172B–E; CX 175; CX 189; CX 208R, Admission Nos. 58–59; RX 555A–B *in camera;* Givens 429; Pond 745, 862–63; Putman 1149, 1174; Moore 1243; Hegel 1947–48, 1961, 2122, 7259; Petzsch 2446; Diggelman 2503, 2515, 2525, 2532, 2586–87; Hooper 2613; Bekin 2867; Robison 3671; H. Wright 3778–79; Cox 4389–90, 4407–08; Freeman 8856 *in camera;* Stewart 9264, 9274–75; Nelson 9822–23; DeLisle 11,267; *see* CX 208R, Admission No. 61.

[20] *E.g.,* Maremont (Givens 429); Questor (Putman 1149); KYB (Moore 1243); Monroe (Hegel 1947); Delco Division of General Motors (Hegel 1961); Bilstein (Petzsch 2446, 2452).

[21] *See* RX 643 p.30 for a diagram of a steering damper, and RX 643, for diagrams of various types of shock absorbers. One witness described a steering damper as a standard shock absorber with specially tailored valving (Kody 9296). Only one steering damper is installed in each vehicle while four vertically mounted shock absorbers are required per vehicle (Pond 1491). Monroe's 1976 catalog lists steering damper applications for Volkswagens (CX 175). Other present applications for steering dampers include off-the-road, and recreational vehicles, Oldsmobile Toronado, and Cadillac Eldorado (CX 239, CX 338C; Nelson 9741).

[22] CX 239; Givens 404–05; Petzsch 2446; Robison 3686–3689; Kody 9296, 9309, 9317–18, 9338.

44. Walker and Monroe officials categorize steering [14]dampers as horizontal shock absorbers.[23]

45. The steering damper functions as a stabilizing and ride control device that acts to absorb and dampen lateral shocks, vibrations and oscillations to the steering system (CX 43B; CX 44D–E; CX 54A; Kody 9334). The function of the steering damper complements and is similar to the function of a vertically applied shock absorber which dampens the vertical oscillations of the vehicle after it has negotiated a bump in the road (CX 220Z8–10; Hegel 1931).

46. The engineering, technology and design requirements of steering dampers are similar to those of other forms of shock absorbers (Pond 768; Hegel 1938, 1941–42, 2114–15). Monroe and Maremont use the same engineers to develop specifications for both steering dampers and vertical applications (Givens 403–04; Hegel 1938, 1941–42). The testing parts and procedures for steering dampers and shock absorbers are likewise similar (Prescott 11,317–19; Bethell 11,354–55, 11,375; *See, e.g.,* RXs 635–639, RX 642).

47. The component parts[24] as well as the manufacturing and assembly processes for steering dampers and shock absorbers are similar (CX 69D; Givens 405; Tompkins 2409; Kody 9309; Nelson 11,046; *see* Pond 1942–43).

48. The various forms of shock absorbers, including MacPherson struts and steering dampers, are distributed by suppliers through the same channels to the same customers (CX 208Q, Admission No. 54; *see, e.g.,* CX 54A; CX 62B; CX 69N; CX 337C; CX 338B; Kody 9325; Nelson 9737–39).

49. Shock absorbers, including MacPherson cartridges and steering dampers, are basically hydraulic dampening mechanisms which reduce the transmission of road imperfections into the vehicle's passenger compartment by converting mechanical energy to heat (Finding 26, *supra*).

50. Monroe and its competitors manufacture and sell a full line of shock absorbers consisting of direct acting, air-[15]adjustable, spring assisted, steering dampers and MacPherson struts and cartridges.[25]

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[23] CX 15B; CX 51D; CX 282A; Diggelman 2555, 2590; Kody 9354; Prescott 11,319; Bethell 11,354–55, 11,375; Ashford 11,494.

[24] The basic component of a steering damper is often a shock absorber cylinder (CX 69D). Walker and Heckethorne use a shock absorber unit purchased from the Gabriel division of Maremont as the basic component of its steering dampers (Pond 770, 798; Schultz 1746, 1831; Nelson 11,071; Prescott 11,295).

[25] CX 99; CX 151A–E; CX 154A–E; CX 173A; CX 208T–U, Admission Nos. 71, 72, 74; Givens 429; Pond 767; Moore 1243; Cook 1715; Hegel 1938, 1941, 1947 2118–20; Petzsch 2446; Diggelman 2503, 2515, 2525, 2532, 2555, 2587, 2590; Robinson 3670–71, 3686, 3689–90, 3703, 3705; Cox 4389; Barbeau 4638–39; DeLisle 11,243; Hohman 4905; Nelson 9729–30, 9736–37, 9743–44, 11,060–61, 11,063; *see, e.g.,* CX 172H.

51. A full line[26] of shock absorbers is included in manufacturers' current shock absorber catalogues.[27] Warehouse distributors and many nontraditional accounts, such as mass merchants and muffler installation shops, purchase a full line of shock absorbers.[28]

52. From the manufacturing standpoint, shock absorbers, including steering dampers and MacPherson struts, constitute a relevant shock absorber product market. The basic engineering, design and manufacturing technologies pertaining to all of these products are substantially similar or the same.[29]

53. From the marketing or distributing perspective, shock absorbers including steering dampers and MacPherson struts constitute a relevant shock absorber product market. Manufacturers distribute shock absorbers, including MacPherson struts and steering dampers through the same channels of distribution to the same customers.[30] Retailers consider their shock absorber line to include steering dampers and MacPherson struts along with the other forms of shock absorbers.[31]

54. Accordingly, it is found that the shock absorber **[16]**product market consists of conventional direct-acting, air-adjustable, spring-assisted, steering dampers and MacPherson struts and cartridges.

B. Exhaust System Parts

55. Exhaust system parts ["ESP"] are products installed on motorized vehicles which have no substitutes. ESP consists of mufflers (including "sports" mufflers), resonators, and all exhaust pipes, connecting pipes, tail pipes, clamps and attaching parts for use on automobiles, trucks, buses, farm equipment and other vehicles (Complaint and Answer ¶1(a); Schultz 1753). As Walker's engineering vice president testified:

> The function of an exhaust system is to conduct exhaust gases from the engine to some exit point at the rear of the vehicle. It also is—performs a function of quieting engine noises and on vehicles where catalytic converters are part of the exhaust system, it also converts hydrocarbons and carbon monoxide to water vapor and carbon dioxide.

(Schultz 1742)

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[26] *See* Finding 50, *supra*.

[27] *E.g.*, Monroe CX 175; Gabriel CX 189; Bilstein CX 220A–Z–18; CX 221C–F; Armstrong CX 224A–Z–62; CX 225; Delco CX 239; DeCarbon CX 314I, Q.

[28] CX 151A–E; CX 154A–E; CX 337B–C; CX 338B–C; Glasman 1062; Moore 1243; Robison 3691; Garfinkel 9204–05; Nelson 9737–39, 9972; *see* Nelson 9850–51.

[29] Finding 46, *supra*.

[30] Findings 19, 40, *supra*.

[31] *See, e.g.*, CX 338C.

VII. Original Equipment and Replacement Submarkets for Shock Absorbers and Exhaust System Parts

56. Automotive parts manufactured and sold for incorporation into new vehicles during assembly are regarded and referred to as being original equipment installation ["OE"] parts (Pond 730).

57. Replacement or aftermarket parts are produced as replacements for damaged or worn out parts on vehicles already in use. The replacement portion of the automotive parts market includes the OE service segment, which consists of "those parts sold to the original equipment manufacturer that, instead of being placed on the vehicle as it's originally produced, go through the warehousing operation to the car dealer and become installed as either service warranty parts or as replacement parts" (Pond 739–40; *see, e.g.,* CX 15E; CX 39B–F; *but see* N. Wright 6343–44).

58. The market for replacement parts includes the traditional aftermarket, which consists of WDs and jobbers who resell to customers such as garages and service stations, as well as the non-traditional channel containing such customers as mass merchandisers and muffler installation shops which resell directly to consumers (Pond 739).

A. Shock Absorbers

59. Shock absorber manufacturers, including Monroe, report shipments of shock absorbers to the Bureau of Census separately for replacement and OE installation (CX 190G–H). [17]

60. The shock absorber industry[32] and its trade association report and analyze sales and competitive conditions separately for the OE and replacement shock absorber markets (CX 51K; CX 25D, H; CX 191B; Baker 537; Pond 744, 828; Putman 1192; Fleuelling 4098–99, 4100–02).

61. Before the merger, both Walker and Monroe separately analyzed Monroe's market share in the U.S. replacement market and in the U.S. original equipment market (CX 7; CX 20A, C–E; CX 51K, Z–6; CX 141B).

62. Monroe has separate engineering and sales departments for its OE and replacement sales (Hegel 2096–97; Hohman 4811; Bethell 11,333).

1. OE Shock Absorbers

63. The parties agree that there is a lack of cross-elasticity of

[32] Concerning the OE and replacement segments of the shock absorber industry, *e.g.,* Mr. Freeman of ITT testified that "yes, we see them as different businesses" (Freeman 8875).

demand between the OE and replacement markets for shock absorbers. That is, a shock absorber produced for the original equipment segment would not be sold as a replacement shock absorber (N. Wright 6465; Nelson 9666, 10,647).

64. Demand for shock absorbers for original equipment use is primarily a function of new vehicle production (CX 208W, Admission No. 87).

65. Shock absorbers made for OE installation are of primarily a single grade (Bracken 4362). Generally, 1″ shock absorbers[33] are the standard size used in new car production (RX 423A–D; RX 424A–F; Hegel 2127, 2130; H. Wright 3804–05; Fleuelling 3907; Nelson 10,433–34).

66. Shock absorbers produced for the OE market are supplied to OE manufacturers in bulk without mountings (Hegel 2133–34; Fleuelling 3908, 4170; Buck 9401; Nelson 9797–98; DeLisle 11,256–58). [18]

67. A shock absorber manufacturer can successfully complete in the OE market with a limited line[34] of shock absorbers because OE sales are geared to one or a few specific shock absorber applications (CX 208X, Admission No. 95; Pond 757–58; *see* Nelson 9685–87, 9692–94, 10, 414).

68. Shock absorbers produced for the OE installation market may have different performance and durability specifications than those produced for replacement use on the same model because the new vehicle manufacturers establish their own OE specifications (CX 208W, Admission Nos. 91, 93–94; Pond 871; Hegel 1983–84; Tompkins 2237; Fleuelling 4171; DeLisle 4868; Freeman 8877 *in camera*).

69. In the OE market shock absorbers are sold in an engineering competition where the emphasis is on the product and whether the product meets certain engineering specifications, as well as meeting subjective and objective ride requirements for a given application (Pond 757; Tompkins 2237; Petzsch 2467; H. Wright 3836; Cox 4415 Hegel 7256–60; Freeman 8876; Buck 9425).

70. Buyers of shock absorbers for OE use are generally professional, technically qualified persons who are responsible for seeing that the product they select meets the vehicle manufacturer's technical specifications (Tompkins 2237; Hegel 7256–57; Buck 9425; Nelson 10,675). The OE buyer is basically an analyst, interested in

[33] There was testimony that the somewhat larger 1-⅜″ size shock absorbers are installed by vehicle manufacturers on police cars and cars designated to be equipped with a handling option package (Hegel 2131).

[34] At the time of trial both Questor and ITT were selling only a single part number to the domestic OE market (Putman 1120–21; *see* Nelson 9692, 10,414–15). In contrast, Monroe supplied approximately 100 OE part numbers for the 1978 model year passenger car production (Hegel 2132–33).

product specification compliance, delivery ability and costs, including freight costs (Pond 794).

71. An OE shock absorber manufacturer must have an OE sales staff which can competently service OE buyer needs in purchasing, engineering and product planning (Freeman 8876–77).

72. OE customers receive few services other than the actual production and delivery of shock absorbers (Pond 793). A shock absorber manufacturer producing for the OE market does not incur costs to provide other services, such as promotional efforts, advertising or catalog service to the OE buyer (Pond 764–65; Cox 4405–07; Freeman 8875; Nelson 9716, 11,680–81). The OE market buyer assumes a significant portion of the production [19]risks including those incurred for raw materials, components and finished goods inventory (Pond 793).

73. The OE shock absorber market "is very cost oriented, relatively short margin, and fairly fixed anticipation of business" (Pond 758, 792–93; *see* Barna 1368–69; Nelson 10,625–26; DeLisle 11,275).

74. Sales of shock absorbers to the OE market have a lower profit margin than sales to the aftermarket (Barna 1369; N. Wright 8694 *in camera;* Nelson 9725–26; *see* Freeman 4173–74).

75. Production of shock absorbers for the OE market generally requires a high volume assembly line designed to produce the size and type of shock absorber for which a firm has an OE contract (Pond 800–01; DeLisle 4866; Nelson 9691–98, 9700–03; *see* H. Wright 3803–04).

76. A shock absorber manufacturer selling only in the OE market would have very limited requirements for low volume production facilities (Pond 801; Barbeau 4650).

77. The production run[35] for an OE shock absorber contract is fairly high, from 1,000 to 20,000 units (Hegel 1978; H. Wright 3805; DeLisle 4865; Stewart 9259–60; *see* Freeman 8845 *in camera*).

78. The location of a given shock absorber plant is a competitive consideration in the OE market because location affects freight costs to the OE vehicle manufacturer (*See* Pond 794; Nelson 9708–09, 10,711, 10,714–15, 10,749–50).

79. OE shock absorber supply does not require extensive warehousing facilities or inventory investment, because OE demand is anticipated several weeks in advance and shipment is made in bulk from the factory directly to the OE vehicle assembly lines (Pond 755–57; Freeman 8889 *in camera; see* Freeman 8875; Nelson 11,126).

[35] A "run" is defined as "[t]he number of identical parts that would be made on a particular assembly line without changing to any other part numbers in the meantime" (Hegel 1979).

80. OE shock absorber contracts extend from one to five years at a set price established by bid (Fleuelling 4013; Hegel 7270–71 Freeman 8842–43 *in camera,* 8891–92 *in camera;* Stewart 9260; Nelson 9678–80, 9724–25, 10,424–25; DeLisle 11,267). The set price can vary only if certain events occur, such as significant increases in costs for labor or material, or [20]large changes in the quantity of shocks needed (Fleuelling 3908–14; Hegel 7261, 7270–71; Freeman 8891–92 *in camera;* Nelson 10,424–26).

81. A lead time of from nine to twelve months is generally required to seek and obtain an OE contract for shock absorbers (Freeman 8855 *in camera;* Nelson 9678–79; *see* Stewart 9260).

82. Prices obtained by producers of shock absorbers sold in the OE market tend to be lower than for those sold in the replacement market (Fleuelling 4173–74; Buck 9416; *see* Nelson 9725, 10,0585 *in camera*).

83. In 1975, Monroe adopted a price cutting strategy to increase its share of the OE market.[36]

2. Replacement Shock Absorbers

84. Demand for shock absorbers sold for replacement purposes depends upon the number of cars on the road, miles traveled, and overall economic conditions (CX 5G). It is affected by incidences of failure of a vehicle's shock absorbers, vehicle owner upkeep and wear on the vehicle's shock absorbers.[37]

85. Shock absorber manufacturers determine the specifications for shock absorbers manufactured for sale in the replacement market (CX 208X, Admission No. 94).

86. Shock absorbers made for the replacement market are generally of three grades, *i.e.,* good, better and best (Bracken 4362; *see* Kalupa 4208, 4210–12).

87. Replacement market customers require a broad range [21]of types,[38] sizes[39] and grades[40] of shock absorbers for full coverage.[41]

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[36] "Corporate wide use will capture increased share of the OE market by *selective price decreases* relative to the market price at that time" (CX 181B, emphasis added).

[37] Replacement frequency for various types of shock absorbers is summarized in Dr. Nelson's testimony (Nelson 9794–9821). There were estimates that struts lasted longer than conventional shock absorbers, and also that they lasted about as long as conventional shocks (Moore 1237, 1404–05; Bush 3288; H. Wright 3841–42 *in camera;* N. Wright 8703–06; Nelson 9794–9821; *see* CX 337, CX 338).

[38] The leading producers and sellers of shock absorbers for the replacement market offer a full line of air and spring-assisted shock absorbers. These shocks are not standard equipment on new cars but may be ordered as optional equipment (Putman 1123, 1168; Hegel 2092, 2137; Robison 3670, 3703; Barbeau 4638–39; Borick 4740; Buck 9377; Nelson 9691–94).

[39] Different diameters of shock absorbers, *e.g.,* the 1⅜" or 1⅝" may be offered for application on the same car.

[40] *See* Finding 84, *supra.*

[41] "It [coverage] goes to whether or not you have a specialty large bore shock absorber for an off-the-road vehicle, whether or not you have a spring assisted shock absorber for older cars, whether or not you have an air shock absorber for station wagons or performance vehicles" (Pond 759; Robison 3691).

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88. While there is a strong customer preference in the WD channel for suppliers who can provide a full line of replacement shock absorbers, some customers in the replacement market tend to purchase from multiple suppliers (Pond 827–28; Barna 1349–50; Bush 3259, 3306).

89. The $1^{3}/_{16}$" shock absorbers are the most popular size for replacement use (RX 424A–F; Fleuelling 4168; Kalupa 4210–12; Nelson 9689, 9694; *see* Hegel 2132; Kalupa 4205–07).

90. Shock absorbers produced for the replacement market are packaged and shipped with the mounting parts (Fleuelling 3908, 4170; Buck 9401; Nelson 9707–08; DeLisle 11,256–58).

91. A shock absorber manufacturer producing for the replacement market incurs substantial costs to provide services, promotional efforts, advertising and catalogs to the replacement buyer (Moore 1260; Fleuelling 3960; Cox 4406–08; Freeman 8875; Stewart 9279; Nelson 9716–17, 11,680–81). The manufacturer generally assumes almost all of the risks to produce shock absorbers for the replacement market.[42] [22]

92. Replacement buyers are more service and market oriented than product and application oriented (Pond 757–58; Buck 9372, 9381). Increased sales and penetration of the replacement shock absorber market are the focus of a strong marketing program in the replacement market rather than changes in design, quality[43] or other factors (Buck 9372).

93. Purchasers in the replacement market are generally merchants concerned with their suppliers' ability to provide sales and distribution services, including an extensive field sales force, as well as to supply adequate coverage for all makes and models of vehicles on the road (Pond 758, 794–95, 833; Schubert 8504–05 *in camera;* Freeman 8875; Stewart 9257, 9279, 9288–89; Buck 9372, 9374, 9381; Kornafel 9449–50; Nelson 11,115–16; Ashford 11,518).

94. Replacement customers in the traditional channel do not buy on bid or have set price contracts (Fleuelling 4173–74).

95. Air-assisted and spring assisted shock absorbers are important[44] to compete successfully in the aftermarket (Pond 778; Buck 9375, 9377; Nelson 9690–94).

96. Prices for shock absorbers sold in the replacement market

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[42] The only exception noted in the record was Sears, which assumes some but not all of the risks that OE buyers assume (Pond 863). Mr. Pond of Maremont characterized Sears as somewhere between the OE purchaser and typical aftermarket customer (Pond 793).

[43] Technical competence alone will not insure success in the replacement market (Freeman 8877; Nelson 10,422, 11,154–56).

[44] *M.E.M.A. Quarterly Product Trend Reports* indicated that air adjustable and spring assisted shocks taken together accounted for approximately 10% (0.097) of reporting companies' replacement sales in 1976, and 9% (0.094) of replacement sales in 1976 and 1977 respectively (RX 31A–B). *See* RX 29B–F, RX 30A–H for prior years.

tend to be higher than for those sold in the OE market (Fleuelling 4173–74; Buck 9416; *See* Nelson 9725, 10,585 *in camera*).

97. Monroe has attempted to increase its share in the replacement market through non-price stratagems, *e.g.,* increased promotions, rather than price decreases (Nelson 10,493; *cf.* CX 181B (OE price strategy)). **[23]**

3. Supply Flexibility

98. A shock absorber manufacturer selling only in the OE market would have very limited requirements for low volume production facilities (Pond 801; Barbeau 4650).

99. Lead time for entry into the replacement business is substantial (Stewart 9259). Some replacement accounts in the nontraditional market, *i.e.,* Sears, have long term supply arrangements which are similar to OE accounts (Buck 9410–11, 9420–21; Schubert 8541 *in camera*).

100. In general, a run[45] for an OE shock absorber contract is fairly high, from 1,000 to 20,000 units (Hegel 1978; H. Wright 3805; DeLisle 4865; Stewart 9259–60; *see* Freeman 8845 *in camera*).

101. A shock absorber manufacturer producing for the replacement market must be able to produce a wide variety of grades, types and sizes of shock absorbers.[46] Various types of shock absorbers such as spring-assisted, air shocks and struts require additional manufacturing equipment[47] and may, in some cases, be most efficiently produced on low volume low speed lines (short lines).[48]

102. The production of spring-assisted shock absorbers requires a spring assembly process, involving hand assembly of a spring over a conventional shock absorber[49] (DeLisle 11,254). Separate assembly equipment is required to assemble these units also (DeLisle 11,254–55). The springs may be manufactured in-house[50] by the shock absorber manufacturer or sourced outside (Barna 1341; DeLisle 11,254–55, 11,271). **[24]**

103. The production of air-assisted shock absorbers[51] requires a

[45] "The number of identical parts that would be made on a particular assembly line without changing to any other part numbers in the meantime" (Hegel 1979).

[46] Finding 87, *supra.*

[47] Findings 102–03, 105, *infra.*

[48] Findings, 103–05, *infra.*

[49] Chrysler, which produces in-house conventional 1" for OE installation, purchases its spring-assisted shocks for OE use from Monroe, as well as other shocks for Chrysler's replacement Mopar line (Fleuelling 3896, 3898; Hohman 4890).

[50] Monroe has manufactured its own springs from purchased coil since 1964 at its Hartwell, Ga. plant. The cost of the special machinery was slightly over $101,000 and $230,000 for the Hartwell and Paragould plants, respectively (DeLisle 11,254–55).

[51] Monroe's Paragould, Ark. plant is the only Monroe facility tooled for air-assisted shocks. While the basic shock absorber component can be manufactured on the automated line with extensive retooling, the unit cannot,

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specialized separate line and equipment to place the boot, or air containing component, on a standard shock absorber (CX 168B; Barna 1341–42; DeLisle 4865, 11,247–52, 11,270; Nelson 9692–93).

104. The aggregate cost of tooling and equipment for the production of specialized units and for packaging equipment is insignificant[52] when compared with the cost of the tens of millions of dollars for equipment required for the production of standard shock absorbers (Hegel 1999–2061 *in camera*).

105. Strut production requires additional equipment which is different from that used in the production of other types of shock absorbers[53] (H. Wright 3782–83 *in camera* , 3784 *in camera,* 3836–38; Bracken 4287–89; Freeman 8846, 8887–89 *in camera,* Nelson 9912–13, 9918, 10,144; DeLisle 11,268–69; *see generally,* N. Wright 11,805–21).

106. To be an effective factor in the replacement **[25]**market, a shock absorber producer needs both high volume, high speed assembly lines and low speed assembly lines (Pond 800–01; H. Wright 3803–05; Nelson 9700–01).

107. The production of low volume specialty items is important to the traditional channel customers, and, to a lesser extent, to the nontraditional customers in the replacement market (Pond 801–02; Nelson 9701–02). Low speed assembly lines (short, or hand lines) are necessary to produce efficiently low volume or specialty units made in production runs of 100–500 units (Pond 801; H. Wright 3803–04; DeLisle 4829, 4862–63, 4871, 4874–75, 11,270).

108. While, as noted, OE production is generally of high volume, there are nevertheless some low volume OE shock absorbers which, because of the low volume demand, are most efficiently produced on short lines (*See, e.g.,* RX 431C, G, I; RX 432B–N; RX 433B–O). However, the record shows that both Questor and ITT compete in the OE shock absorber market with only high volume shock absorbers (Putman 1120–21; *see* Nelson 9692, 10,414–15).

109. The use of a high volume line to produce low volume specialty items results in inefficiencies caused by long changeover times (H. Wright 3803–04; Nelson 9701–03; DeLisle 11,276). The changeover time and retooling costs are much lower to run a new

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however, be finished on the automated line (DeLisle 4865). In 1975, to increase efficiency, Monroe added separate welding facilities to the air shock line at a cost of over $44,000 (DeLisle 11,249, 11,270). Other special equipment for the air shocks cost approximately $60,000 (DeLisle 11,255).

[52] The total cost for this equipment is less than 5% of the replacement cost of the standard tooling in Monroe's Paragould, Ark. plant alone (*See* Hegel 2061 *in camera* and Findings 102–03, *supra*).

[53] *E.g.,* Chrysler, which produced *only* conventional shock absorbers, contracted out the production of its struts (Bracken 4312; DeLisle 11,267). Although Ford was able to use some of the equipment it had previously employed to produce conventional shock absorbers in its new hybrid strut (which is similar to a MacPherson strut), most of the equipment in that strut line is new (Bracken 4287–89; Nelson 9695–96; N. Wright 11,635–36).

part number on a short line than on lines designated for longer production runs (H. Wright 3803–04; DeLisle 4829–30, 4862–63, 4871, 11,275; Nelson 9701).

110. Shock absorber assembly lines are most efficient[54] when specialized according to size. Because a line changeover from 1″ to 1–$\frac{3}{8}$″ or 1–$\frac{3}{16}$″ shock absorbers requires a change in almost every component in the assembly line, such specialization can eliminate "duplication and **[26]**triplication of downtime resulting to model changeovers which would affect the efficiencies not only of the manufacturing processes, but the assembly processes" (Cook 1624; Hegel 1981–82; DeLisle 4864–65; Hegel 7268; Nelson 9694–96, 9698–99, 10,601; DeLisle 11,275).

111. Special packaging machinery[55] required for shock absorbers produced for the replacement market is not required for OE shock absorbers which are sold in bulk (Buck 9401; Nelson 9707–08).

112. Manufacturers are obligated to meet their OE contracts and to be prepared to deliver the specified quantity of shock absorbers, as well as to meet the order requirements of their replacement customers (Pond 794–95; Freeman 8888–91 *in camera;* Buck 9374; Nelson 10,622–23; DeLisle 11,273–74).

113. Even though both OE and replacement demand can fluctuate within a given time period, shock absorber manufacturers cannot simply shift from OE to replacement customers unless there is excess capacity available[56] (N. Wright 11,666–68, 11,681–82). The record shows no evidence of abandonment by shock absorber manufacturers of any customers in order to serve other customers (Nelson 10,682–83, 10,686, 10,669–70).

114. An abrupt attempt to shift production from OE installation to replacement products might damage ongoing relationships with OE customers. Likewise, an abrupt shift in production from replacement to OE (unlikely because of the lead time required for OE contracts) could harm relationships in the replacement market (*see*

[54] Monroe's shock absorber assembly lines are currently specialized according to size (Cook 1624; DeLisle 4865, 11,275). Monroe has, in the past, produced multiple sizes of shock absorbers on the same line but has realized savings of $4.2 million and increased capacity by switching to a system of specialized lines (Cook 1624–25, 1631; Nelson 9695–96, 10,601; DeLisle 11,275). Respondent's lengthy argument regarding the production flexibility of shock absorbers is discussed more fully in Finding 116, *infra.* Respondent's presentation on this issue was extremely thorough. However, its persuasiveness was diluted by the fact that Monroe does not currently produce shock absorbers in a manner which involves switching production lines from one size to another because it is not economically efficient (*See* Finding 116, *infra*).

[55] Packaging machinery at a cost of over $35,000 per plant is available for use at each Monroe Plant (DeLisle 11,256–57).

[56] In 1975, when Monroe experienced demand for its replacement shock absorbers exceeding its domestic capacity, it did not shift production away from its OE installation customers (RX 52A–D; RX 423A–D; RX 424A–F; Nelson 9681–82, 10,683, 11,143, 11,188). Monroe purchased shock absorbers from other manufacturers and its foreign plant, incurring higher costs than if Monroe itself had produced the shock absorbers in its own domestic plants (CX 5Z–14; Cook 1627–28; Barbeau 5965–70; Nelson 9681–82, 11,143).

Findings 80–81, *supra;* Pond 794; Freeman 8888–89 *in camera;* Nelson 9681–82, 10,456–57, 10,670–73; *see* N. Wright 11,666–68, 11,681–82). [27]

115. Complaint counsel's economic expert testified that, in an oligopolistic market,[57] such shifts might upset market equilibrium, thus making manufacturers reluctant to challenge the status quo (Nelson 10,686–88).

116. Monroe production data for 1976, as presented by respondent, indicate that at that time there was shifting of production lines between OE and replacement, as well as lines operating for joint production (RPF 38–49; RPF pp. 14–19, Tables I–V). This evidence supports the proposition that production flexibility between OE and replacement shock absorbers is possible. On the other hand, complaint counsel presented evidence that after 1976 Monroe changed its production lines, so that these lines are now specializing in the production of one size of shock absorber. As a result, Monroe realized cost savings of $4.2 million (CRPF p.50; Finding 110, *supra*).

B. ESP

117. Exhaust System Parts constitute a separate overall market distinct from other automotive parts (Nelson 10,305).

118. The parties agree that there is no cross-elasticity of demand between the OE and replacement market for ESP (Nelson 10,306, 10,647; *see* N. Wright 6465).

119. ESP is sold for two basic uses: incorporation into new vehicles during assembly (OE installation) and replacement of worn out or damaged units on existing vehicles (Pond 739, 744).

120. The ESP industry separately reports and analyzes sales and competitive conditions in the OE and replacement markets (CX 106B–C; CX 120E; CX 191; Baker 535, 537; Putman 1116). Walker analyzes conditions separately in the OE and replacement markets (CX 27D, F, N–"O"; CX 31A). Mr. Putman of Questor, a significant ESP producer, characterized the distinction between selling to the OE and replacement markets: "There is a world of difference. It's like two different activities completely" (Putman 1116).

121. Walker and other ESP producers report shipments of [28] ESP separately for replacement and OE use to the Bureau of Census (CX 190G–H).

122. Pricing of ESP differs between the OE and replacement markets. The OE market is sold primarily on a bid basis while the replacement market price is based on price lists[58] (Putman 1162;

[57] *See* Findings 185–86, *infra*, concerning replacement market concentration.

[58] Respondent and complaint counsel agree that in both the shock absorber and exhaust system parts

(Continued)

Moore 1323; Ince 4950; Foster 5049–50; Nelson 10,350, 10,352; Ashford 11,403–04). **[29]**

123. Taken as a whole, sales to the OE market are less profitable than are those to the replacement market (CX 244A–E *in camera;* CX 246 *in camera;* Nelson 10,353–54, 10,355 *in camera*).

124. Warehousing and distribution facilities are generally more extensive for a manufacturer supplying ESP for the replacement market than for a manufacturer supplying ESP for OE installation use (CX 25Z–4–N; CX 27N; CX 208Z–21, Admission Nos. 217, 219; Baker 552–53; Pond 755–58; Putman 1116–18).

1. OE Exhaust System Parts

125. Demand for ESP sold for OE installation use is a function of new vehicle production (CX 106B; CX 208Z Admission No. 107; *see* CX 27E).

126. To serve the ESP market for OE installation, a manufacturer must produce ESP for the current year, but may choose to produce only for a limited number of applications[59] (CX 27D; CX 208Z–1, Admission No. 114; Baker 551; Pond 757–59; Putman 1116, 1119).

127. In the OE market, the same firm may not supply all of the ESP components for a given application (Baker 553; Schultz 1760). For example, a firm may bid to supply an exhaust pipe-muffler combination, but not the tail pipe (Putman).

128. Aluminized mufflers, stainless steel pipes and resonators

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industries it appears that pricing in the original equipment service market and independent aftermarket were related: "If the vehicle producers were to lower their price to the car dealers, that would definitely have some impact on the decision making process of the manufacturers who are supplying the replacement market other than through the OE service channel" (RPF 151; CRPF p.53; Nelson 10,785; *see also* N. Wright 11,726). Mr. Pond of Maremont testified that:

> [I]n the exhaust system business historically the aftermarket has followed changes in the original equipment pricing, at list.
>
> If General Motors, Ford, and Chrysler have increased their component prices over a period of several months, then typically following that there would be an aftermarket price change by whomever the price leader might be in the aftermarket.
>
> In the shock absorber business, the pricing probably tends to be a little bit more geared toward what occurs in the aftermarket, because there is a—shock absorbers tend to be a one price product line. Whereas exhaust is typically priced by application, shock absorbers are typically priced by type of shock absorber.

(Pond 760).

Mr. Putman of Questor agreed:

> Back when I first came in the business and got on the AP sales force, there was almost a blind following of precisely the car factory prices and, that is, the list prices. And then the whole prices were figured on the basis of what price the vehicle manufacturer charged his dealers. And then there had evolved a discount structure there from that to arrive at the final blue sheet price. And it just stayed that way with minor modifications for 25 years now.

(Putman 1172). Respondent argues that this pricing link as well as other differences are sufficient to remove OES from the replacement market altogether (RPF 156; RRPF n.18).

[59] Arvin and Walker, two leading OE producers for OE have a range of 225 to 289 part numbers for OE use and produce approximately 2,500 part numbers for the replacement market (CX 325A–B; Baker 551, 672–73; Schultz 1759–60; Bush 303).

are used for OE installation ESP (Baker 559–62, 634–35; Pond 871; Schultz 1811, 11,232).

129. Mufflers shipped for OE installation use are generally in the form of a welded exhaust pipe-muffler combination with some tail pipes occasionally included in the assembly (Putman 1117–18, 1165; Schultz 1809; Saker 5002–03, 7599–7602). **[30]**

130. ESP products for the OE installation market are shipped in bulk (Baker 552, 685–86; Putman 1117; Saker 7581, Nelson 10,329).

131. ESP sold for OE use are produced to specifications established primarily by the vehicle manufacturer (CX 208Z–1, Admission No. 111; Baker 550; Putman 1100 *in camera,* 1102–03, 1162–63; Moore 1322–23; Schultz 1771–74, 1808, 1810–11, 1848–49, 1855–59; Tompkins 2237).

132. In the OE market for ESP, the product is sold in an engineering competition with every part being thoroughly tested by the buyers (CX 25S; CX 27D; Baker 552, 562, 566; Pond 757–59; Moore 1322; Putman 1100 *in camera;* Schultz 1772, 1778; Tompkins 2237; *see* Nelson 10,351–52). The OE customer supplies the ESP manufacturer with the space constraints in which the ESP system will fit, the location and type of silencing devices to be used, the objective and subjective noise levels, the back pressure and the durability requirements (Schultz 1771–72; Nelson 11,068). The ESP OE design engineers work closely with the vehicle manufacturer to develop workable designs (Schultz 1855–56). Their designs must then be submitted to the OE customer's engineers for final evaluation and approval (Schultz 1771–72, 1778–79, 1855–56; Nelson 11,068).

133. The primary ability required for success in the OE market is the ability to design and manufacture a product which meets the manufacturer's specifications at low unit cost (CX 25E, S; Baker 551–55, 644, 648; Pond 757–59).

134. In the OE market the most significant elements of cost are the basic engineering and manufacturing expenses (Baker 553–55, 588–89, 648–49, 685–86).

135. The ESP manufacturer's use of advertising for OE installation ESP is minimal or non-existent (Baker 565–68; Pond 764).

136. Buyers in the OE market for ESP are technically knowledgable professionals (Baker 551–52; Tompkins 2237).

137. Geographic plant location is a factor in securing OE installation business. Producers with plants located closer than competitors to vehicle assembly plants have an advantage in obtaining OE business (Pond 794; Bracken 4348; Saker 5005, 7598–99; Nelson 10,340, 10,755; Schultz 11,210–11; *see* N. Wright 11,778–79).

138. Warehousing facilities for ESP producers are not much needed for the OE market. Operating under an agreed-to schedule, a producer can anticipate a customer's demand several [31]weeks in advance and arrange for prompt shipment of the manufactured products (Baker 552–53, 623, 671–72; Pond 755–59; Putman 1117–18; Saker 7611–12). Manufacturers may, however, carry a very small amount of inventory as "float." (Saker 7611–13).

139. The method of setting prices for ESP sales to the OE market is not the same as for the replacement market[60] (Foster 7322–36 *in camera;* Ashford 11,403).

2. Replacement Exhaust System Parts

140. Demand for ESP for replacement purposes results primarily from the failure of a vehicle's exhaust system. Overall replacement demand is influenced by the number of vehicles in use, the number of miles driven, the average age of the vehicle population and the useful life of the exhaust product (CX 106B; CX 208Z–Z–1, Admission Nos. 108, *see* 109; *see* CX 27H).

141. Specifications for ESP for replacement purposes are established primarily by the ESP manufacturer (Baker 550; Putman 1100 *in camera,* 1102–03; Moore 1322–23; Schultz 1773, 1781, 1808, 1810–11, 1848–49, 1855–59).

142. Engineering for the replacement market focuses on the consolidation of part number offerings (Baker 551, 644–45; Putman 1100 *in camera;* Schultz 1810, 1844–45; 1852–53). The relationship between the product engineers and the replacement buyers differs from the OE market in that most WDs and mass merchandisers have neither design engineers nor engineering expertise in ESP[61] (Schultz 1856–59).

143. In the ESP replacement market a supplier generally offers all ESP components (*e.g.,* exhaust pipe, muffler and tail pipe) for a given application (Schultz 1760).

144. Manufacturers of replacement ESP need a broad line of all the ESP components fitting various makes, models and model years (CX 24G–H, CX 25Z–3; CX 208Z–21, Admission No. 221; Baker 537–38, 540, 636–38, 658; Pond 757–59; Putman 1119, 1167; Kittridge 1404; Schultz 1759–60, 1844; Bush 3303–05).

145. ESP sold to the replacement market differs from [32]that sold to the OE market in specifications, materials and, in the case of resonators, some elimination of that part from the ESP "package" (Baker 559–61; Pond 811–12, 870–71; Putman 1100–01 *in camera;*

[60] *See Findings* 202–203, *infra* regarding profitability.

[61] Walker has a separate engineering department for its OE and replacement sales (CX 37B).

Moore 1241; Nelson 10,764). Manufacturers of replacement mufflers may cut corners on acoustics and back pressure specifications (Baker 559–60, 650; Pond 870–71; Putman 1100–01 *in camera*). Aluminized mufflers are used for OE production, while galvanized mufflers are common in the replacement market (Baker 559–62; Pond 871; Schultz 1811). Stainless steel pipe which is used for OE is not used for replacement (Baker 634; Schultz 11,232). Generally, pipes are used in lieu of resonators in the aftermarket (Baker 634; *but see* Moore 1241).

146. "Universal" muffler lines, which achieve the maximum market coverage with the fewest possible part numbers, are sold primarily to muffler installation shops and mass merchandiser accounts (Verner 890; Nedell 969–71; Putman 1096–98, 1166; Moore 1313; Kittridge 1403, 1437; Schultz 1844; McAdams 8994; Goodman 9090–91). These "universal" mufflers differ in size and basic design from mufflers sold for OE installation use and are thus not used on cars as OE (Verner 890; Nedell 969–71, 988; Putman 1096–98, 1166; Kittridge 1403, 1434, 1437; Schultz 1844; Luyckx 3748; McAdams 8994; Goodman 9090–91).

147. ESP manufacturers, including the leading firms, also produce "performance" or "sports" mufflers for replacement customers[62] desiring higher noise levels. "Sports"-type mufflers have a different type of construction from other mufflers.[63]

148. Exhaust systems components are individually packaged (mufflers) or are specially coated and labeled (pipes) for the replacement market (Baker 552, 559–60, 624; Putman 1108–09, 1118; Schultz 1798, 1814, 1848–49; Nelson 10,329–31).

149. An ESP manufacturer for the replacement market incurs, in addition to the basic manufacturing costs, sales [33]expenses, warehousing costs and merchandising expenses such as advertising, which are either much smaller or nonexistent in the OE market (CX 5R; CX 246; Baker 553–55, 564–66, 588–89, 685–86; Pond 764).

150. ESP buyers in the replacement market are generally nonprofessionals with a merchandising orientation[64] (Baker 551–52; Tompkins 2237).

151. Generally, in the replacement market sales are made in separate parts for exhaust pipes, mufflers and tail pipes (Baker 557; Putman 1117–18, 1165; Schultz 1809; Saker 5002–03, 7599–7601, 11,234).

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[62] Sports mufflers rarely are used in OE (Schultz 1854; *see* Luyckx 3748).

[63] (Putman 1166; Kittridge 1403, 1430–31, 1437; Schultz 1851, 1853–54). A sports muffler has a straight through design and is filled with fiberglass, whereas a standard muffler has a series of tubes and baffles and relies on the principle of cancellation rather than absorption to control the noise level (RPX 2; Schultz 1800–02, 1853–54).

[64] However, purchasing agents of mass marketers may have, as in the case of Sears, certain technical familiarity and financial sophistication approaching that of some OE purchasers (*See, e.g.*, Buck 9409–12, 9420–22).

152. Warehousing, packaging, cataloging and delivery are stressed in merchandising efforts for ESP in the replacement market (Baker 552–53, 565–67, 648–49, 661–63; Pond 757–59, 811–12; Verner 908–09; Putman 1116–17; Nelson 10,332–33, 10,336–38; Ashford 11,518, 11,531). Thus, sales merchandising, distribution, availability and brand name recognition are considered important, if not the most important, ingredients for success in the ESP replacement market (CX 5R; CX 25Z–3; Baker 553–55, 567, 660–61–, 663; Pond 757–59, 811–12; Verner 908–09; Putman 1116–17; Nelson 10,336–38).

153. An efficient warehousing and distribution system with a large investment in inventory is necessary to adequately serve the ESP replacement market. Such a warehousing system[65] is necessary because replacement ESP manufacturers are expected to have a large number of low volume part numbers available for replacement customers, who generally purchase relatively small quantities of each part number (Baker 552–53, 671–73; Pond 755–59; Putman 1118; Nelson 10,333; Ashford 11,531).

154. Geographically dispersed plants are a competitive advantage in the ESP replacement market (Ashford 11,535–36).

155. Prices for replacement ESP are based on established price lists with variances accounted for by cost justified discounts (Moore 1323; Foster 7233–35 *in camera;* Ashford 11,403). **[34]**

3. Supply Flexibility

156. Mufflers are designated by "cross section" or external dimension.[66] Cross sections are determined by the configuration of vehicles. Basic design parameters for cross sections are established when the vehicle is first engineered and are thereafter carried through the specifications of both original equipment and replacement mufflers (RPF 75; Schultz 1765, 1779–80; *see* Putman 1164; Moore 1241, 1271; Schultz 1858).

157. A crimp type enclosure is used on mufflers made for the replacement market whereas a spun type enclosure is used for mufflers manufactured for the OE market (Moore 1222–23, 1328–29). A substantial capital investment would be required for a producer of crimp type mufflers, such as Midas, to shift over to the spun type (Moore 1322–23, 1328–29; Nelson 10,415–16).

158. The record does not reveal the total number of muffler cross sections in use by all manufacturers for original equipment or

[65] Approximately two-thirds of an ESP plant may be devoted to warehousing and distribution functions (Schultz 1795).

[66] Muffler cross section is the manufacturer's method of defining the size of the muffler. For example, on a muffler cross section designated as 5 by 9–¼ inches, the 5 indicates the minor radius on either end and the 9–¼ indicates the major radius of the muffler shape (Saker 7573).

replacement use. Evidence presented in a Walker "1976 Original Equipment Competitive Analysis" indicated that at least seventeen cross sections were produced by the industry for OE use in passenger cars in 1976 (CX 325A–B; Nelson 10,320; N. Wright 12,542–44). All but one of the eleven cross sections produced by Walker for the OE market have replacement applications (RX 325B; Schultz 11,222–23).

159. The machinery necessary to package replacement mufflers costs between $40,000 and $100,000 depending on its degree of automation (Schultz 11,214–16).

160. All mufflers are produced from some of the same basic equipment regardless of cross section (Baker 628–30; Saker 7581). However, muffler assembly lines individually tooled for the manufacture of specific cross sections achieve the greatest efficiencies in production.[67]

161. In order to produce mufflers of different cross sections a change in tooling on the assembly line is required (Saker 5005, 7578–80, 7612–13). The time required for these [35]tooling changes varies from thirty minutes to two days (Saker 7580; Schultz 1845–46, 11,205). For example, a changeover from one cross section to another at Walker's Greenville, Texas plant requires fifty man-hours of labor during which the assembly line is idle for four hours (Saker 7580–81).

162. Walker seeks to minimize changeovers in its manufacturing operations, and to use the equipment as efficiently as possible (Schultz 11,229). It is not economically feasible to changeover the tooling on an assembly line if only a few mufflers of a given cross section are to be made (Schultz 1846).

163. Generally, the production lines for mufflers are set up to produce one or, at most, a few muffler cross sections.[68] Once a line is set up for a given cross section it can produce several part numbers (including both OE and replacement mufflers), provided that the units have the same shape when viewed endwise (Saker 7577; Nelson 10,738).

164. ESP production runs for OE installation are generally of a higher volume than those for the replacement market (Bracken 4348–49; Saker 5010–11). Thus, production facilities for the two markets may differ, with the higher volume, more automated lines serving the OE market, while the more flexible but less automated

[67] (*See* Findings 161–63, *infra;* Baker 628; Saker 7676–78.)

[68] (Baker 632–33; Saker 7573, 7577; Nelson 10,322–23, 10,346, 10,758; Schultz 11,238; *see* Saker 5006, 5008; Ashford 11,534.) Walker tends to assign the production of a given cross section to a single plant and, generally, to a single line within that plant (Saker 5005, 5008). At Walker's Greenville, Texas plant, only replacement mufflers are produced on one assembly line because there are no OE orders for the cross section(s) which that line makes (Saker 7570, 7573). At this plant, other than in an emergency, there has been no production shift from line one, which produces cross sections required by the aftermarket only, and line two, which produces those cross sections needed for OE or OE and replacement (Saker 7570, 7614).

lines primarily producing ESP for the replacement market (Bracken 4348–49; Saker 5010–11; *see* Baker 628).

165. Walker's Jackson, Michigan plant produces primarily for the OE market. However, testimony and exhibits indicate that four out of five plants supplying the OE market also produce at least some ESP for the replacement [**36**]market. The fifth, the plant located at Newark, Ohio formerly produced catalytic converters, and pipe for the OE Market only. That plant has been rebuilt for another purpose. There are seven Walker plants supplying the replacement market, of which three also supply original equipment (CX 39B–F; CX 244 *in camera;* CX 290; Bracken 4348; Foster 5072, 5074; Nelson 10,342–43, 10,744–46; Schultz 11,214).

166. To compete successfully in the OE market, an ESP producer need produce only a few muffler cross sections, whereas to compete successfully in the replacement market the ESP manufacturer needs to produce all or nearly all of the 17 or 18 muffler cross sections sold for that market.[69] Further, the OE manufacturer need not produce all of the cross sections used for original equipment installation to be a significant competitor.[70]

167. There was testimony that tooling considerations, *e.g.,* downtime, cost of duplicate machinery, diminish the ability of an ESP manufacturer to switch production lines from cross section sizes used for OE or OE and replacement to those cross section sizes manufactured solely for replacement. As a result, ESP producers are generally required to have enough production lines devoted solely to those cross sections peculiar to the replacement market, thus diminishing production flexibility (Saker 7573; Schultz 11,202; Ashford 11,534; *see* Saker 7570).

168. Midas, one of the top four ESP manufacturers for the replacement market does not sell ESP to the domestic OE market[71] (Moore 1319).

169. Production flexibility between the ESP replacement and OE markets may be somewhat diminished by the contractual constraints on the ability of an ESP producer for the OE market to shift production from OE to replacement customers (Nelson 10,419–21). The OE producer is required to [**37**]meet his commitments, which generally run in three year terms, to the OE customer and also be mindful of the development time necessary to sell a new ESP

[69] (Nelson 10,317, 10,322–23, 10,345–46; Schultz 11,221; Ashford 11,534.)

[70] No ESP producer for the OE market manufactures all of the cross sections used for OE (CX 325A–B; Baker 627–28m 632–33; Nelson 10,345–46). Walker, the second largest OE supplier, as of April 1979 made only nine cross sections for the OE market while at the same time it made 17 or 18 cross sections for the replacement market (Schultz 11,221–22).

[71] "There are some sales to original equipment manufacturers in Canada" (Moore 1319).

application to an OE customer (Schultz 1856, 11,234; Saker 7601; Nelson 10,338).

C. OE Service and Independent Aftermarket Submarkets for Shock Absorbers and ESP

170. The OE service market consists of sales made by shock absorber and ESP manufacturers to vehicle manufacturers for resale to their dealer outlets while the aftermarket encompasses all other replacement sales (Pond 744; *but see* N. Wright 6336–43, 11,732–33).[72]

171. M.E.M.A. reports both ESP and shock absorber sales separately for OE service and the aftermarket (CX 120–B–C; CX 162A–D; Fleuelling 4131; Nelson 10,307).[73] Walker relies on such statistics for business planning purposes and for filing public documents (CX 208Z, Z–4, Admission Nos. 180–181).

172. Walker separately analyzes its sales, market share and competitive conditions in the domestic ESP aftermarket specifically excluding OE service (CX 29I).

173. Both Monroe and Walker have described sales of shock absorbers and ESP to new vehicle manufacturers for resale to car dealers as the OE service channel of distribution (CX 24G; CX 31B; CX 208Z, Z–4, Admission Nos. 104, 124; Baker 546–47; Barbeau 4648, 4650; Hohman 4811; Saker 4992–94).

174. Manufacturers use separate sales forces and distinct sales programs to serve the OE service and independent aftermarket[74] (Baker 547; Putman 1100 *in camera;* Fleuelling 3848, 4154; Kalupa 4230; Hohman 4811). Monroe, Walker and their leading competitors in the sale of shock absorbers and ESP employ small, technically oriented sales forces to sell to the service market, while devoting extensive promotion and marketing [38]oriented field sales forces to sell to the independent aftermarket (CX 39M; CX 143I–J; CX 208Z–22, Admission No. 223; Baker 545–46; Pond 744–45, 747, 754, 757–58; Putman 1100 *in camera,* 1116–18; *see* CX 39G–L).

175. The OE sales forces of leading producers of shock absorbers and ESP sell those products to the vehicle manufacturers for both OE service and OE installation purposes (CX 31B; CX 208Z–3, Admission Nos. 118–120; Baker 545–47; Pond 744–45, 754; Putman

[72] Under this breakdown, sales from one manufacturer of ESP or shock absorbers to another manufacturer of the same product are excluded (*e.g.*, CX 120A–B).

[73] However, it should be noted that M.E.M.A. reports sales to OE installation and OE service in a single category without differentiating between the two.

[74] Some companies also have different sales forces for traditional and nontraditional customers within the aftermarket (*see*, RRF 47; Nelson 10,678–79).

1117–18). Generally, ESP producers do not make direct sales to vehicle dealers (Putman 1118).

176. GM uses separate divisions to serve the OE service market and the independent aftermarket (Robison 3692–93; Fleuelling 4131).

177. Orders in the OE service market, particularly for a current model year, are awarded to one or more of the shock absorber or ESP producers who furnish a given vehicle manufacturer's OE production requirements (Baker 548–49; Pond 760–61; Putman 1119; Luyckx 3748; Nelson 10,314).

178. Geographically dispersed warehouse stocks of parts are necessary to serve the aftermarket effectively whereas the vehicle manufacturers have their own independent distribution system for OE service (Baker 547, 671; Pond 739–40, 755–56; Nedell 946, 968; Glassman 1027; Nelson 10,314, 10,405–06).

179. Services[75] provided by shock absorber and ESP manufacturers to customers in the independent aftermarket are performed by the vehicle manufacturer in the OE service market (Baker 566–67; Verner 908–09; Nelson 10,405–06.

180. A firm selling to the independent aftermarket must have a broader range of parts for all recent years' makes and models (*i.e.*, greater coverage) to compete effectively than is necessary to compete successfully in the OE service market (CX 24H; Baker 547, 556–57; Robison 3691, 3694; Nelson 10,781). **[39]**

181. If Arvin's experience is typical,[76] then the existence of OE service as a submarket of the replacement market is bolstered by the difficulties which Arvin has encountered in its efforts to enter and become a significant factor in the ESP independent aftermarket.

182. The above-described factors are sufficient to make the finding that OE service sales should be included in a submarket separate from other replacement sales of shock absorbers and ESP.

VIII. Market Structure

A. Shock Absorbers

183. The total net dollar sales of replacement shock absorbers in

[75] *E.g.*, catalogues and merchandising programs.

[76] Arvin sold only to OE installation and service customers for many years before 1959 (Baker 649, 677, 682–83; Pond 811; Putman 1183; Nelson 10,310). Although Arvin had expertise in engineering and manufacturing ESP, Arvin found such abilities to be of little importance in winning customers in the independent aftermarket and encountered severe problems (Baker 559, 655; Pond 811–12; Nelson 10,310–11, 10,420–21). Arvin's reputation as a successful ESP producer for the OE market did not insure automatic acceptance in the aftermarket (Baker 559). Consequently, Arvin was forced to acquire new skills in merchandising, promotion and advertising. Fourteen years after its entry, Arvin believed itself to be in fourth place in the aftermarket behind Walker, Maremont and Questor (AP) (Baker 578–79; Pond 811–12).

the United States by manufacturers in 1975 were over $250 million, and in 1976 were over $290 million (CX 261 *in camera*).

184. The great bulk of these sales were made by four companies: Maremont, Monroe, Questor and General Motors.[77] The remainder were accounted for by over a dozen other domestic **[40]**and foreign shock absorber and vehicle manufacturers.[78]

185. Concentration in the manufacture and sale of replacement shock absorbers in the United States is very high, with the top two firms accounting for 77.6% in 1976. The top four firms accounted for 91.4% of such sales in 1975 and 92.9% in 1976 (Nelson 10,145 *in camera,* 10,147, 10,152–53).[79]

186. With respect to shock absorbers sales to the independent aftermarket, concentration is likewise high, with the two leading companies having 81.9% of this market in 1975, and 80.9% in 1976. The top four figures were 94.4% in 1975, and 95% in 1976. Dollar sales to the independent aftermarket in 1975 totalled almost $235 million, and in 1976 were over $275 million (*see* CX 262 *in camera*).

187. In 1976, there were 13 manufacturers which had sales of shock absorbers in the United States in excess of $100,000 (CX 261 *in camera; see* CX 4R; CX 20E; CX 191D). Of these, Maremont, Monroe, Questor and General Motors were recognized as being major suppliers (CX 3E; CX 15I; Pond 829; Nedell 942; Putman 1130; Stapleton 3429; H. Wright 3833; Fleuelling 4043, 4138; Nelson 11,027 *in camera*).

188. These same four firms have dominated the U.S. shock absorber replacement market since the late 1960's. During this period, concentration has remained very high (Pond 742; Barna 1359–60; Stapleton 3471–72; Kalupa 3638, 3657–58; Borick 4755; Buck 9378; Nelson 10,154). Tenneco's Corporate Development Department recognized this high concentration, stating as follows in its 1976 examination of the shock absorber replacement market:

There are four principal suppliers of shock absorbers for vehicles in the United States who supply both the **[41]**original equipment (OE) market and the aftermarket and CA/M. Delco Products Division of General Motors, Maremont Corporation, and

[77] Maremont manufactures Gabriel, as well as private label shocks (Pond 756). Monroe manufactures under its Monroe brand name, private label for Midas and Montgomery Wards (CX 202). Questor manufactures shock absorbers under the Columbus, Goerlich and Thruway brands, and also private labels (CX 205; Putman 1104). General Motors manufactures shock absorbers for the replacement market under its AC-Delco brand name (CX 240; Robison 3666, 3670).

[78] The list includes: Ford, ITT, Armstrong Hyd., Bilstein, Arolmex, Blackstone, Kayaba, Chrysler, Boge, Spax, Girling, and Corte & Cosso.

[79] The top two firm concentration figures are from *in camera* data in the record. However, Rule 3.45(a) specifically reserves the right of the ALJ to disclose *in camera* data to the extent necessary for the proper disposition of a case. There was some discussion regarding whether dollars or units more accurately reflected concentration in the relevant markets. In Dr. Nelson's opinion, dollars were more accurate, while Dr. Wright, respondent's economist, believed units to be more representative (N. Wright 6940–52, 12,287–93; Nelson 10,138–40).

Monroe Auto Equipment Company controlled 83% of the aftermarket in 1967, and have probably increased that percentage since then.

(CX 3E; *see* CX 15I; CX 20E)

189. Since at least 1960 Monroe has been one of the two leading suppliers (Pond 742; Kalupa 3638; Borick 4755).

190. Other than the acquisition of shock absorber companies by ESP producers, there were no new entrants into shock absorber manufacturing in the United States between 1958 and 1978 (Putman 1109, 1203; Moore 1326; Nelson 10,214).

191. Exits from the business evidence a trend toward even greater concentration in the shock absorber replacement market (Nelson 10,154). In 1975–76, Chrysler exited as a manufacturer of replacement shock absorbers (CX 261 *in camera;* Nelson 10,158; *see* Pond 791–92; Thompkins 2429; Steward 9280; Nelson 10,707). Immediately prior thereto, Moog essentially exited the market as a reboxer (Nelson 9789, 11,073). In 1978, Armstrong closed its North American (Canadian) shock absorber manufacturing facility (Steward 9524; Nelson 9929, 10,158–59).

192. In June 1977, Ford began to discontinue the manufacture of conventional shock absorbers, and plans to manufacture only a portion of its future MacPherson strut needs (Pond 791, 862; Luyckx 3730; H. Wright 3778–79; Fleuelling 3880, 3942; Bracken 4280; Stewart 4280; Stewart 9280; Nelson 9912–13, 10,158). As a result, Ford has significantly curtailed its manufacture of shock absorbers (H. Wright 3778–79; Fleuelling 3942–43; Stewart 9820; Nelson 9912–13). Moreover, Blackstone, a small manufacturer of replacement shock absorbers in the U.S., is attempting to exit the market (*see* Finding 411, *infra*).

193. In addition to the 17 companies which manufactured replacement shock absorbers for sale in the United States in 1975 and 1976, eight companies (including Midas, TRW and Arvin) were engaged in the purchase of replacement shock absorbers for resale by them to wholesalers and direct-buying retailers in competition with shock absorber manufacturers (CX 263 *in camera;* Putman 1131; Nelson 9785–86, 10,210). Such resellers are known in the trade as reboxers.[80] (Nelson 9782–84).[42]

194. Total sales by reboxers of shock absorbers in 1975 were over $9.5 million, and in 1976 were approximately $12 million (CX 263 *in camera*).[81]

[80] The other reboxer firms were Interpart, AGM, Roka, RRS Engineering, and Mickey Thompson (CX 263 *in camera*).

[81] Monroe itself in 1975 purchased a quantity of shocks from Questor which it resold as a reboxer (*see* n.57, *supra*). Walker also performed a reboxer role in 1975 and 1976, purchasing shock absorbers from Monroe for resale to muffler installation shops (Cook 1635).

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195. In 1975, Monroe's sales of shock absorbers in the United States for replacement use amounted to $90.54 million, which accounted for 35.9% of the market. In 1976, the figures were $110.07 million and 37.7%, respectively (CX 261A *in camera*).

196. Until the past few years, Monroe was recognized by itself and the industry as the undisputed price leader in the shock absorber replacement market (CX 5M; CX 181B; Putman 1132; Nelson 10,522–23).

197. Since approximately 1975, Maremont and Monroe have acted as the leading firms in the pricing of replacement shock absorbers (CX 5M; Pond 843; Putman 1132; Robison 3684; Luyckx 3748–49; Nelson 10,522–23, 11,097, 11,119; *see* Luyckx 3731–32). There was testimony that other replacement shock absorber producers cannot sell at higher prices than those charged by Maremont or Monroe (Putman 1132; *see* Luyckx 3731–32, 3748–49). Questor and GM look to Monroe and Maremont in setting their replacement shock absorber prices (Putman 1132; Robison 3684, 3721–22). Ford looks to Monroe, Maremont, Questor and GM in setting its replacement shock absorber prices (Luyckx 3731–32).

198. Walker's operational relationship to shock absorbers began in 1974 with its purchase of Triple S Industries[82] (Complaint and Tenneco's Answer, Section 44, *see* Finding 379, *infra*). In 1976, sales of Walker's steering dampers, a form of shock absorber, and other shock absorbers accounted for 0.3% of the shipments of shock absorbers in the U.S. replacement market (CPF 124 *in camera;* CX 29H; CX 197; CX 263 *in camera;* Nelson 9792). Walker's sales of shock absorbers which it "manufactured"[83] represented 0.2% of the total sales in the U.S. replacement market. As a reboxer, Walker had shock absorber sales of $184,000 in 1975 and $236,000 in 1976, [43] representing approximately 0.1% of the total U.S. replacement sales in these years (Nelson 9784, 9792).

199. Historically, the replacement shock absorber business has been markedly profitable (CX 144; CX 145F–G; Pond 777–78, 856–57; Borick 4754; Nelson 10,590–91). Over the years, Monroe has earned a high rate of return on its stockholders' equity and assets (Nelson 10,591).

200. The record shows that Monroe's profitability declined in the middle 1970's. There were two reasons for this: (1) strong competition from Maremont and (2) the existence of factors not normally associated with the historic profitability of the U.S. replacement market (CX 3J; CX 4C; CX 5Z–12; CX 21B; CX 146A; Nelson 10,591).

[82] *See* Findings 369–83, *infra.*

[83] *See* Finding 381, *infra.*

In the eyes of Walker, one such factor was Monroe's costly, inefficient and inattentive management. (Cook 1581–84, 1593–94, 1599–1600, 1620; Nelson 10,600; Ashford 11,453–54, 11,541). Another factor was the losses and start up expenditures experienced by Monroe's expanding foreign operations (CX 5Z–12; CX 21B; CX 160B; Cook 1620; Nelson 10,591, 10,599–10,600). An additional factor was the substantial premium incurred by Monroe in purchasing shock absorbers from its competition, and from its Brazilian plant (CX 256A–B; CX 257A–B; CX 270A–B; Cook 1627; Ashford 11,464–65). By 1976, prior to the merger, these adverse problems were, or were in the process of being corrected (Cook 1581, 1583, 1615, 1620, 1624–25, 1631; Nelson 10,592).

201. As for the competitive activity of Maremont, and Monroe's response thereto in recent years, the effect has been to make the shock absorber business more competitive and less attractive to potential entrants than it otherwise would have been (Pond 858–59; see Cook 1581, 1593–94; Nelson 10,591–91A).

202. In the present litigation, respondent portrays the shock absorber industry as one of deteriorating profitability (*see* RPF 191–210). Respondent's economist, Dr. Neal Wright, prepared calculations concerning rates of profitability for Maremont,[84] Questor,[85] and [44]Monroe.[86] According to Dr. Wright's calculations (which are disputed by complaint counsel),[87] the rates of return for these companies were less than the average return on stockholders' equity for all manufacturers.

203. The data upon which Dr. Wright based his calculations regarding Monroe's profitability appearing in RX 573 are found in RX 278A. (These exhibits are reprinted in RPF Appendix B). Mr. Barbeau, Monroe's domestic comptroller, constructed RX 278A from the internal accounting records of Monroe (RPF 198–99). The exhibit was designed to present a clear picture of Monroe's earnings from which Dr. Wright could calculate profitability figures (RPF 198–210). Complaint counsel continue to claim that these exhibits are unreliable (CRPF pp.61–63).[88] Whatever the dispute, the record shows Walker's perception of the shock absorber market as an attractive

[84] (RPF 195–97; Dr. Wright converted Maremont's 9.9% pre-tax return on assets found on RX 187 pp.12,16 to a return on stockholders' equity of 22.1%, which was less than the 22.7% average return on stockholders' equity for all manufacturing concerns in 1976, as reported in the FTC's Quarterly Financial Report for the first quarter of 1978 (RX 38; RX 512; N. Wright 6809–11 *in camera*, 6817–19 *in camera*, 8649, 1249–51).

[85] The documentation for Questor was less specific. Dr. Wright's conclusion that Questor has not achieved a satisfactory rate of return for either its shock absorbers or exhaust replacement sales in recent years is based on RXs 161–63; Putman 1198–1200; N. Wright 6809–11 *in camera*, 6817–19 *in camera; see* N. Wright 12,254–55).

[86] *See* Finding 207, *infra*.

[87] *See* CRPF pp.60–63.

[88] Complaint counsel view respondent's accounting data as flawed, and complain, *inter alia*, of improper adjustments and allocations leading to distortions in Monroe's profitability (CRPF pp.61–63).

one from a profitability standpoint, particularly as to Monroe's ability to enhance Walker's (and thus Tenneco's) overall profitability.

It is clear from internal documents that Walker believed Monroe's reduced earnings to be a "temporary problem" (CX 10C). Increased earnings were projected for Monroe in 1976 and 1977 over those experienced in 1974–76, even without Monroe's acquisition (CX 4C, Z1–Z2; CX 5D, Z–12; CX 11; *see* CX 4, pp.35–36; CX 5, pp.2–4, 64–66; Cook 1583–85, 1594, 1613–14, 1618–19, 1622, 1625; Nelson 4A–B; CX 5, p.77; CX 6B; Cook 1594; Ashford 11,455).

204. The question of the existence of "buyer **[45]**power"[89] in the shock absorber replacement market, and its bearing upon the profitability of that market was pursued at great length in the record by respondent (RPF 221–58). The buyer power theory as a defense is based upon the premise that the presence of dominant buyers in a market insures that the market will function competitively.

205. While Walker believed that the state of competition in the replacement market would prevent Monroe from returning to its historic high profitability, Walker nevertheless, held of the opinion, prior to the merger, that Monroe's profits would rebound to where it "can reasonably be expected to return to better than average rates," either on its own or with the assistance of Walker (CX 10B; Cook 1594). "[S]igns of turnaround at Monroe," detected by Walker prior to the merger, were "coming to pass" at the time of trial, according to Mr. Cook, president of Tenneco Automotive (CX 10A; Cook 1638).

B. ESP

206. The total net dollar sales of replacement ESP in the United States by manufacturers in 1975 were over $467 million, and in 1976 were over $494 million (CX 264 *in camera*).

207. The bulk of those sales were made by five companies: Tenneco's Walker, Maremont, Questor, Arvin and Midas. The remainder were accounted for by approximately 18 of the domestic and foreign ESP or vehicle manufacturers.[90] **[46]**

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[89] Buyer power was described as an economic phenomenon in which the dominance of large purchasers results in intensified price competition and diminished profitability for the sellers in that industry. Respondent relies on buyer power in its effort to explain the competitive state of the shock absorber business. (Nelson 11,193; *see* N. Wright 12,230–31).

[90] The list includes: Hooker, Muffler Dynamics, GM, Tampco, Exzostic, Mitchell, Mercury Tube, Arnold Haviland, Everco, Superior, ITT, American Muffler, Carlson Industries, Hayes-Albion (through Eagle), Fenton, Ford and Eagle. (CX 264 *in camera*) Walker produces Walker and private label ESP (CX 27K). Questor produces AP mufflers, Goerlich mufflers and private label ESP (Putman 1095). Arvin manufactures ESP under the Arvin and Supreme labels as well as private labels (Baker 539). Midas manufactures ESP under the Midas and IPC labels (Moore 1220). Maremont manufacture Maremont and private label ESP.

208. Concentration in the manufacture and sale of replacement ESP in the United States is high, with the four leading companies having 73% of this market in 1975, and 73.5% in 1976 (CX 264 *in camera*).

209. All five of the companies named in Finding 207, *supra,* including Midas, are recognized as significant competitors in the U.S. replacement market (CX 27N; Baker 537, 551, 638, 641–42, 715, 725; Pond 829; Putman 1123, 1127; Ince 4936–38; Ashford 11,529–31).

210. Walker is by far the leading manufacturer and seller of U.S. replacement ESP. In 1975 and 1976 its market share was approximately 31% (CX 264 *in camera*). Its sales in those years were almost twice that of the second leading firm; more than twice that of the third; and roughly three times those of the remaining significant suppliers (CX 264 *in camera*).

211. While the same companies have continued to play a major role in replacement ESP for several years, the market share of Walker has been on the increase (Buck 9389; Nelson 10,934–35 *in camera,* 11,024; Ashford 11,528–31; CX 27N). According to Walker's 1976 Five Year Plan presentation, the company expected further market share increases in the immediate years to come (CX 27N).

212. There has been no new entry of any significance in the replacement ESP market for the past several years (Nelson 10,385, 11,027–28 *in camera*). During that time certain companies, minor factors, exited from that market. Named in the record were McCord, Grand Safeguard and Hayes-Albion (Putman 1184, 1203; Kittridge 1411; Stapleton 3457; Nelson 10,380, 10,385, 10,739, 11,074–75).

213. Walker is recognized by its competitors and others as being the price leader in replacement ESP (Baker 602–05; Nedell 944; Putman 1127; *see* Nelson 10,470–71, 10,513–14, 11,099; *but see* N. Wright 8320–21). The record sets forth a notable example of Walker's pricing ability: Following the Monroe merger, Walker initiated a 4% decrease in ESP prices, a move each of its major competitors felt compelled to respond to (Baker 595–97, 603–04; Pond 830; Nedell 944; Putman 1128–29; Stapleton 3428–29; Ince 4973–78). When, some months later Walker raised its prices, its competitors moved in a similar direction (Stapleton 3491; Ince 4976–77).

214. According to internal documents and reports, Walker regards itself as the dominant supplier of ESP to the replacement market (CX 13A; CX 27B, E; CX 107A; CX 288). Walker's studies concerning the acceptability of its products and preferences of jobbers and dealers reinforce this view (CX 104; CX 105). [47]

215. As attested to by complaint counsel's economic analyst, Walker in 1975 and 1976 earned a very high rate of return on its

assets employed in replacement ESP (Nelson 10,553–54 *in camera*, 10,610, 11,102–05; analyzing CX 26A–B; CX 244; CX 246).

216. Among vehicle manufacturers, GM produces the largest quantity of replacement ESP (CX 264 *in camera*). But its ESP product line is not broad enough to supply customers other than its dealers. Thus, its replacement ESP sales, together with those of other vehicle manufacturers such as Ford, are confined to the OE service segment of the business rather than the independent aftermarket (Baker 569–73; Robison 3695; Luyckx 3747; Fleuelling 4168; Bracken 4280–81, 4305; Nelson 10,307, 10,456, 10,497–98).

217. The percentage of the ESP replacement market represented by OE service sales has been declining steadily for the past several years. In 1976 the OE service share of the market stood at only 8% (CX 264 *in camera;* read in conjunction with CX 265 *in camera;* CX 15G; CX 28D; Cook 1658 *in camera, interpreting* RX 232C *in camera*).

218. The total net dollar sales by manufacturers of ESP direct to the independent aftermarket in the United States were $427.9 million in 1975 and $458.3 million in 1976 (CX 265 *in camera*).

219. Concentration in the sale by manufacturers of ESP direct to the independent aftermarket in the United States is high, with the top four firms accounting for 78.9% and 78.7% of such sales in 1975 and 1976 respectively (CX 265 *in camera*).

220. As in the case of the entire replacement market Walker is by far the largest supplier of ESP to the independent aftermarket (CX 27N; CX 227A; Steward 9270). Walker's share of the independent market in both 1975 and 1976 was approximately 33% (CX 265 *in camera*).

IX. Barriers to Entry

221. There is little disagreement between the parties that barriers to entry in this case are high for both shock absorbers and ESP.

A. Shock Absorbers

222. There are significant economies of scale in the production of shock absorbers (Moore 1288; Poe 8958; Stewart 9285–86; Nelson 10,132, 10,795). A single shock absorber plant of the minimum efficient scale must be able to produce annually in excess of 6 million shock absorbers, [48]representing in excess of 10% of the U.S. replacement market for shock absorbers (CX 208Z–15, Admission No. 186; Nelson 9914, 10,125, 10,795). Thus, according to complaint counsel's economic witness, there is a very high economy of scale

barrier present in the replacement shock absorber market (Nelson 11,015–16).

223. A substantial investment in plant and equipment is required to enter into the sale and manufacture of shock absorbers for replacement purposes (CX 4T; CX 5Z–15; CX 143L; CX 144B, E; Thompkins 2295; Borick 4753; Poe 8958). Dr. Nelson, testifying in support of the complaint, while recognizing the lack of precise figures indicating the present day cost of duplicating a shock absorber plant, placed the figure in the next-to-highest level of capital cost barrier classification (Nelson 10,127–28).

224. Substantial lead time is necessary to enter shock absorber manufacturing *de novo* (Petzsch 2443; Bracken 4291; Cox 4408, 4415; Freeman 8847, 8856 *in camera*). Witnesses estimated that lead time at eighteen months or more (H. Wright 3786; Bracken 4289–93; Freeman 8847 *in camera;* Nelson 9678–79).

225. Entry into the sale of shock absorbers to the independent aftermarket requires a substantial investment in warehousing facilities and inventory; a substantial marketing organization, including a large national sales force; and the financial ability to grant a variety of extended payment terms to customers (CX 144E; CX 191B–C; CX 205; CX 208Z–19, Admission Nos. 208–211; Pond 747, 755, 777, 779–80; Verner 908–09, 914; Nedell 946; Glassman 1027; Putman 1108; Cook 1597–1600, 1704; Bush 3287; Robison 3677–78; Luyckx 3736, 3746; Borick 4753; Freeman 8875; Stewart 9256–57, 9279, 9281, 9283–84; Kornafel 9433, 9436; Fouty 9483, 9488; Nelson 9690–91, 9709–11, 10,128–30, 10,198, 10,255, 11,115–16).

226. To compete successfully in the sale of shock absorbers to the independent aftermarket, a company must offer several different basic sizes, types and quality levels of shock absorbers, and a full line of shock absorbers fitting most vehicles made or sold in the U.S. (CX 144E; CX 208A–15, Admission No. 187; Verner 908–09; Nedell 946; Bush 3306; Robison 3670–71, 3677, 3691; Luyckx 3745; Kalupa 4205–07; Buck 9374; Schubert 8504–05 *in camera;* Kornafel 9436; Nelson 9685–87, 9918, 10,128–29). A firm must distribute nationally, must be able to supply the products in a relatively short period of time, and must be able to supply nearly 100% order fill (CX 4F; CX 208Z–19, Admission No. 192; Pond 777–79; Verner 908–09; Nedell 946, 968; Glassman 1027; Cook 1600, 1627–28, 1630–32, 1704; Stapleton 3477; Robison 3695; Luyckx 3745–46; Buck 9374; Kornafel 9436–38; Fouty 9487–88; Nelson 9713–14, 10,128–29, 10,193; Ashford 11,497–98). As of 1974, to meet the needs of the domestic vehicle [49]market alone, more than 5,000 shock absorber part numbers were required (CX 143L; *see* CX 208A, Admission No. 2).

227. The practice by major producers of providing consigned inventory to customers, along with dating terms, constitutes another barrier to entry into the sale of replacement shock absorbers to the wholesale and retail channels (Nelson 10,128–30). Monroe and Maremont promote their products by extensively consigning inventory, thereby enhancing product availability and thus sales volume (CX 4N; CX 21C; CX 191C). While Monroe supported these consignments with extensive advertising, the real incentive to the dealer to agree to accept these inventories has been a promotional program offering attractive dealer premiums such as low cost trips (CX 4N; CX 5L; Cook 1599–1600). This program "enabled the dealer and his wife to travel virtually any place in the world for a modest out-of-pocket cost." (CX 5L) The program boosted Monroe's sales and gained Monroe such a strong dealer allegiance that many wholesalers felt compelled to carry the Monroe line (CX 5L).

228. In 1975 and 1976, Monroe, Maremont, Questor, and GM granted a variety of extended payment terms to their replacement shock absorber customers (CX 208Z–19, Admission Nos. 208–11; Robison 3677–78; Kalupa 4203, 4240).

229. Suppliers of shock absorbers to muffler installation chains have furnished various forms of financial assistance to such chains to enable them to increase their number of outlets (Verner 908–09; Nedell 961–64 *in camera*). Such support can be of substantial importance, especially for a rapidly growing retail installation chain (Verner 909–10; Nedell 961–66 *in camera*).

230. There is a moderate absolute cost barrier to entry into the replacement shock absorber market presented by the technical requirements for entry, including in-house production of machinery, and the existence of patents (Nelson 10,165, 10,843, 10,845).

231. The current major producers of shock absorbers are long established firms (Putman 1192–93; Robison 3701; Bracken 4280; Fleuelling 5795). These companies enjoy an absolute cost advantage over potential entrants by virtue of the ownership or control of numerous U.S. and foreign patents (CX 168A–B; CX 169A–G; CX 224Z–59; Petzsch 2452, 2465). Monroe believes that its shock absorber patents have afforded it valuable property rights and it is its policy to enforce its patent rights in the courts (CX 4V). These patents are important in the manufacture of shock absorbers, especially advanced design shock absorbers which require two or more years to develop and perfect (Givens 397). The significance of the shock absorber patents, however, should not be overstated; as observed by Walker prior to the merger: **[50]**

Monroe believes that while its ride control patents have afforded valuable proprietary

rights . . . its engineering and manufacturing, and particularly its marketing capabilities are the principal factors in maintaining its position in the market.

(CX 4V)

232. Monroe designs much of the tooling and some of the equipment used in its shock absorber plants (Hegel 2167, 2169–70, 2176, 2186, 2201). Monroe also manufactures in-house some of its plant equipment (Hegel 2169–70, 2188, 2193; DeLisle 11,250).

233. The major producers of shock absorbers for the replacement market have developed a high degree of product differentiation for their products, particularly regarding sales to the traditional wholesale channel (CX 4N; CX 5"O"; CX 21C; Bush 3312–13; Freeman 8875; Stewart 9256–57, 9278–79; Buck 9372; Nelson 10,132, 10,193, 10,795). It would be a difficult matter for a new entrant to overcome these preferences, according to the record (Putman 1152–54; Barna 1348–50; Stewart 9256–57, 9278–79; Nelson 10,048).

234. While brand name loyalty is of less significance in private label sales, there was some testimony that the reputation of quality possessed by the major producers was important to private label purchasers who installed shock absorbers (Glassman 1028–32).

235. Another factor important in establishing and maintaining buyer preferences in the sale of shock absorbers is the use of an extensive field sales force which calls not only on WDs but also calls directly on the WDs' direct and indirect customers, jobbers and retail outlets, to assist them in the sale and promotion of shock absorbers at the retail level (CX 21C; CX 145C; CX 191B; CX 208Z–18, Admission No. 203; Verner 908–09; Cook 1597–99; Bush 3305–06; Stapleton 3477, 3479–80; Robison 3667; Freeman 8875; Stewart 9257, 9279; Kornafel 9434–35; Nelson 9718–19, 10,048, 10,128–30, 10,193; Ashford 11,438). As of 1976, Monroe had more than 250 such field representatives promoting its replacement shock absorbers, the largest sales organization specializing exclusively in the shock absorber replacement market (CX 141G; CX 143I).

236. In addition, a separate sales and service force is needed to perform the somewhat more sophisticated servicing program required to successfully sell to nontraditional replacement shock absorber accounts (Stewart 9283–85, 9288–89).

237. Advertising and promotional expenditures also have helped replacement shock absorber manufacturers that sell to the wholesale channel and certain mass merchants to achieve and maintain a high degree of product differentiation (CX 3C; [51]CX 5"O"; 143I; CX 144E; Pond 765; Putman 1153; Cook 1597; Bush 3306–07; Stapleton 3473–74; Robison 3677–78, 3706; Luyckx 3746; Fleuelling 3960; Cox 4379, 4406; Freeman 8875; Goodman 9070, 9074; Stewart 9256–57,

9279; Nelson 9690–91, 9717–19, 10,048, 10,128–31, 10,193; Ashford 11,438). Monroe has recognized the importance of these marketing efforts to its success in the replacement market, as evidenced by the following Monroe advertising representations:

> Monroe is first in shocks because we are first in brand awareness and preference. We've enjoyed that leadership because of our national advertising efforts over the past 50 years.

(CX 319B, CX 332D)

238. Shock absorber manufacturers have made extensive use of consumer advertising, often on television or radio as well as using cooperative advertising programs directed at the installers (CX 143I; CX 144E; 167; Pond 765; Putman 1153; Stapleton 3473, 3480; Robison 3677, 3706–08; Nelson 10,206; Ashford 11,438). Monroe has for years engaged in extensive consumer advertising and promotional programs for the replacement market, with the claimed result that consumer awareness of the Monroe brand is greater than that of any other brand of shock absorber (CX 143I; CX 144E).

239. Monroe began consumer advertising for replacement shock absorbers in 1956 (Fleuelling 3940). Since then its advertising program has continued to grow, as has that of its leading competitors (Robison 3677, 3706–08). By 1974, Monroe emphasized network television sports programs, resulting in an estimated 1.4 billion adult impressions across the United States. Monroe credited its advertising "for the fact that among car owners who would specify brand, the preference for Monroe [in 1974] was almost two and one half times greater than for the closest competition" (CX 143I; *see* CX 144E). As of 1974, Monroe's Chairman announced that Monroe was "currently launching a new advertising campaign, concentrated on top-rated television sports programs, and supplemented by product and marketing messages in automotive trade and consumer publications. During the remainder of calendar 1974 it is anticipated that your company's products will be viewed over 460 million times" (CX 146B). Following this campaign, Monroe made the following representations to the replacement market in 1975: "That's advertising muscle. The kind that keeps Monroe a leader in brand awareness and preference. A 1975 survey supported that position with an awareness score for Monroe that is 106% above its nearest traditional distribution competitor" (CX 330D).

240. Monroe and its subsidiaries in fiscal 1975 incurred advertising costs of $12.7 million, and in fiscal 1976 $13.1 million (CX 191E). Monroe also maintains an unlimited cooperative advertising program for its branded accounts (Stapleton 3480). Under this program,

Monroe pays 50% of all [**52**]Monroe product advertising done by such accounts (Stapleton 3480; Kalupa 4200).

241. As mentioned in Finding 240, *supra,* Monroe renders service and assistance to private label accounts. In the instance of Midas, Monroe helps in developing sales promotion programs, and provides catalog assistance and funds for cooperative advertising (Moore 1260).

B. ESP

242. There are significant economies of scale in the production of ESP. The plant or plants of minimum efficient scale necessary to produce a full line of replacement ESP would account for in excess of 10% of the unit shipment in the U.S. replacement market (CX 25X; Bracken 4349; Ashford 11,534–35).

243. Entry into the manufacture and sale of replacement ESP is very expensive (Baker 694; Ashford 11,534–35). Manufacturing facilities of minimum efficient scale necessary to produce a full line of replacement ESP would cost a total of $35–40 million, in the judgment of Monroe's current president (Ashford 11,535).

244. To enter the independent ESP aftermarket on a major basis, a firm would have to make substantial investments in warehousing facilities and inventory, establish a substantial marketing organization, including a large national sales force; and have the ability to grant a variety of extended payment terms to customers (CX 27K; CX 205; Baker 663; Verner 914; Glassman 1026; Kittridge 1407; Schultz 1795; Jaffe 2806–07; Stapleton 3477; Foster 5107; Ashford 11,438, 11,531; *see* CX 208Z–20, Admission No. 215).

245. In order to compete successfully in the sale of ESP to the independent aftermarket, a producer must offer a full line of ESP fitting most vehicles made or sold in the U.S., including foreign made vehicles (CX 2B; CX 25Z–3; CX 27M, Q; Baker 537–38, 540, 544–45, 636–37, 658; Verner 901–02, 908–09; Kittridge 1404; Bush 3303–05; Kornafel 9433). A firm must also distribute nationally, must be able to supply ESP products in a relatively short period of time, and must have the ability to supply nearly 100% order fill (CX 4F; CX 208Z–20–Z–21, Admission Nos. 216–217, 219; Baker 544–45, 660, 672; Verner 908–09; Nedell 968–69; Cook 1597–98, 1630; Bush 3317; Stapleton 3456, 3473–74; Kornafel 9433, 9437, 9449–50; Fouty 9487; Ashford 11,438). Walker attributes its gain in market share over the last two years, in part, to its ability to deliver 98% complete orders of ESP within five working days (CX 25Z–3, 4; CX 27N; *see* Kornafel 9434, 9437, 9449–50).

246. The practice by the major ESP producers of providing dating

terms, advancement of advertising funds, [53]capital expansion funds and loan guarantees for customers constitutes another barrier to entry into the sale of ESP (Baker 663; Verner 908–09; Nedell 938, 958; Jaffe 2793–94, 2806–07; Stapleton 3477, 3490; Fouty 9491; Ashford 11,532).[91]

247. At the close of the year 1976, the record shows that Walker was the owner of approximately 150 unexpired ESP patents, with about a dozen applications pending (CX 40A–W).

248. Walker also possesses extensive proprietary ESP manufacturing knowledge and techniques. Traditionally, Walker has built internally of its tooling and specialized processing equipment, and some of its test equipment (CX 25Z–7; Schultz 1738, 1787–88, 1804–06, 1846–47; Bracken 4350).

249. The leading replacement ESP producers have been long established in that business (Baker 649; Pond 743–44; Putman 1109). These companies have developed a significant degree of product differentiation for their products, particularly on sales to the wholesale channel (Baker 553–54, 558–59, 567, 642, 668; Glassman 1026; Putman 1152–54; Foster 5107; *see* CX 27M; CX 104A–H. Witness Putman of Questor, speaking of the significance of brand name recognition, regarded this as "very important". "In other words, had it not been for that, some of these lesser companies like the Havilands and Hayes-Albions would have made a big penetration" (Putman 1154).

250. Another obstacle to success in selling ESP in the traditional replacement channel is the usual practice of WDs to stock only one manufacturer's line of ESP products at a given location (Baker 592–95, 921; Putman 1129–30; Bush 3303; Stapleton 3475; Nelson 10,490).

251. The witnesses mentioned a number of reasons, among others, for this WD practice: the large physical space [54]needed to warehouse two ESP lines; problems generated by the necessity of having to use more than one ESP catalog by the WD and his customers; purchase order confusion; uncertainty in meeting truckload freight requirements; lack of part interchangeability in competitive product lines (Putman 1130; Bush 3303–04; Stapleton 3475–76; Nelson 10,490–91, 10,771).

252. For an ESP supplier to obtain new WD business, a total "changeover" is the standard procedure. Under this arrangement, a

[91] A prime deterrent to the growth of a retail muffler installation chain is the acquisition of real property for new locations (Nedell 939, 961 *in camera;* Jaffe 2793–94). Growing, small chains often lack the funds necessary for such property acquisitions (Nedell 939; Jaffe 2793–94). Thus, such firms become dependent for their growth on their ESP suppliers' ability to provide the requisite property acquisition funds (Nedell 938–40, 961–62 *in camera;* Jaffe 2793–94). One method by which such chains may be helped is to have the supplier guarantee the mortgage for the outlet locations (Nedell 939–40; Jaffe 2807). For example, Walker provided capital expansion funds to Car-X, a leading chain of muffler installation shops (CX 27K; CX 110A–B; Nedell 938; Jaffe 2793–94, 2806–07).

supplier must physically remove all of the WDs' old ESP inventory, and replace it with a full line of the new supplier's ESP brand ("stock lifting"). Since this is done at no cost to the WD, it is an expensive measure for the supplier (Baker 597; Pond 867–68; Bush 3306–07; Stapleton 3475).

253. The major ESP producers, including Walker, maintain a large number of field sales personnel who call upon not only WDs, but also upon the direct and indirect customers of the WDs, *i.e.*, jobbers and retail outlets to assist in the sale and promotion of ESP (CX 24C–D; CX 27M; CX 104C; CX 208Z–22, Admission No. 223; Baker 663; Verner 909; Bush 3305–06; Stapleton 3477; Kornafel 9434–35; Ashford 11.438, 11,507, 11,531–32). Walker, as of 1976, had a sales force of approximately 290, which it held in high regard (CX 24B, H; CX 39; CX 104C; CX 208Z–22, Admission No. 223).

254. Advertising and promotional expenditures have also assisted ESP suppliers selling to the traditional channel to achieve and maintain a high degree of product differentiation and brand name loyalty (CX 38A; CX 104C–D, G; Baker 567–68, 661, 668–69; Glassman 1026; Putman 1152–53; Moore 1276–77; Stapleton 3477; Foster 510 *in camera;* Nelson 10,201–04, 10,337; Ashford 11,506–07, 11,531). While Walker's promotional efforts, in the past have been geared towards the use of premiums and trips for wholesalers and installers, there has been significant recent advertising by the company (CX 38A; CX 316B; CX 318C; CX 329A–D; Baker 668–70; Cook 1704–04; Stapleton 3477; Foster 5107; Nelson 10,200–03, 10,920, 10,924–26, 10,964; Ashford 11,503–04, 11,506–07, 11,532).

255. In 1976, Walker's point of sale and trade journal advertising expenditures were approximately $1.5 million, more than double the 1975 amount (CX 38A). In 1976, Walker also spent an additional $2.1 million for other advertising and promotional purposes (CX 38A–B). Included in these latter expenses was $1.1 million for "promotional support funds for distribution systems" (CX 38B). Walker's "initial objective" in such advertising and promotional efforts is to "support the dealer and thereby increase his exhaust volume," while its "prime objective is to bind the dealer's loyalty to the Walker product since an established brand loyalty by the dealer can be a deterrent to the jobber and the warehouse distributor in changing exhaust lines" (CX 27J; Nelson 10,965; *see* CX 24C–D). **[55]**Walker declared that "competition cannot match the size and scope of our current wholesaler marketing activities. . . . We do not believe our competitors have the financial strength to match the strategy" (CX 27J; *see* CX 24C–D).

256. Walker has recently increased its consumer advertising of

ESP since brand awareness on the part of consumers has been on the rise, especially with the increase in self-repair among automobile owners (CX 24D; CX 321; CX 349, p. 18; Cook 1657 *in camera,* 1712). With respect to consumer advertising, Tenneco's 1979 Annual Report stated:

> A major development in Walker Manufacturing Company's approach to its market was inaugurated in early 1979 when the unit became the first manufacturer of aftermarket exhaust systems to advertise in national media. The Walker campaign, which was successfully test marketed in 1978, will appear on national television and radio as well as in national magazines and leading newspapers and trade publications.

(CX 349, p. 18)

During 1979, Walker used extensive TV advertising for its Walker brand ESP (Nelson 10,205, 10,920, 10,964–65; Ashford 11,503–04). Walker also maintains a cooperative advertising program with its customers to promote ESP sales (Nelson 10,205, 10,965–66; Ashford 11,503).

257. By 1978, Midas was also engaged in a national advertising for its outlets, using television, and supplementing this with radio and print advertisements (Moore 1277; Nelson 10,966). Walker's consumer advertising program was in part in response to this Midas effort, according to complaint counsel's economic witness (Nelson 10,966).

258. In its five year marketing plan, 1976–81, Walker states that its ". . . aftermarket strength is a result of our superior engineering expertise, our manufacturing and distribution network, our sales force, our product services, and the greater financial strength afforded by our profitability and our relationship with Tenneco" (CX 24B; *see* CX 104C–D, G).

X. Compatibility Factors Respecting Shock Absorbers and ESP

259. Much evidence was adduced in this case concerning the existence of commonalities in the production and sale of shock absorbers and ESP. This evidence concerns marketing **[56]**channels and methods, common competitors and customers, as well as similarities in manufacturing, engineering and other technical steps involved in research and development.

260. In the opinion of witness Baker of Arvin, shock absorbers are "very compatible" with ESP in the area of distribution and sales. So are other automotive products sold in the aftermarket, such as spark plugs. And there are other replacement products, such as tires and batteries that are not as compatible (Baker 664–68).

261. It was the testimony of witness Glassman, a purchasing

agent for independent automotive service centers, and a man of long experience in the automotive aftermarket, that, in general, "everybody that installs exhausts will install shocks. It is the next item after exhaust as an add-on selling feature. It is almost one and the same" (Glassman 1009; *see* 992–97).

262. Witness Moore, a high official of Midas, testified at 1248: "Well, again, I believe that the two product lines are compatible all the way through the process, from manufacturing, distribution, to the sale to the ultimate enduser [sic]. And I think that there are advantages as I say at each level" (*See also* Moore 1235–37, 1246–49, 1286–90).

263. Prior to the merger, Walker's president, Mr. Cook, stated in an office memorandum discussing the proposed acquisition:

> During the past reviews of Walker's five year plans, we have had discussions with the Tenneco Planning Department regarding potential new product lines that would most closely fit with our present exhaust business, and the answer has been collectively agreed to be shock absorbers. As is detailed in the preliminary background attached, the product line is the most compatible and is significant enough to justify pursuing.

(CX 10A; *see* CX5P; CX 13A; *see also* CX 4E–G; CX 20G; CX 21A, C–D)

264. A report prepared in July and November 1976 by Tenneco's Corporate Development Department, summarizing its view of the shock absorber business and focusing on Monroe, stated:

> An acquisition of a shock absorber manufacturer would be advantageous to Walker in a number of ways. As pointed out before, shock absorbers are sold through the same channels of distribution that exhaust systems are sold. Additionally, shock absorbers would support the approved move into the U.S. retail market by Walker.

(CX 3C) **[57]**

265. In a series of three documents, each entitled "Proposal to Acquire Monroe Auto Equipment Co.," company officials discussed the various compatibility factors existing between shock absorbers and ESP, and as respects Walker and Monroe in particular, in manufacturing and distribution as well as in marketing (CX 4A–Z–5; CX 5A–Z–22; CX 6A–C).

266. In his presentation to the Tenneco Board of Directors requesting authorization to acquire Monroe, Walker's president pointed out the compatibility between Monroe shock absorbers and Walker ESP in their manufacture, distribution, sales engineering and research and development, and the fact that both Walker and Monroe have common competitors and customers (CX 20A, G–H; CX 21C–F; CX 187A).

267. In 1978, following the merger, Tenneco established the

Tenneco Automotive division to oversee the operations of Walker, Monroe and the Speedy Muffler King retail specialty unit that was recently formed for U.S. operations (CX 349, p. 127; Cook 1570–72, 1646; Kalupa 3534; Fleuelling 5784; Ashford 11,401, 11,481–82). In particular, Tenneco Automotive performs market research, personnel hiring, accounting and finance functions for the three operating divisions, and is expected to perform purchasing for them (Kalupa 3534, 3537–38; 3558; Ashford 11,649). Furthermore, subsequent to the Monroe acquisition, Tenneco designated Mr. James Ashford, the Executive Vice President of Walker, as President and chief executive officer of Monroe (Cook 1608; Ashford 11,480–82).

A. Manufacturing

268. Respondent presented elaborate evidence, including slide shows and physical exhibits, demonstrating the differences between the production of shock absorbers and ESP (*see, e.g.,* Hegel 1926–98, 1999–2061 *in camera,* 2067–2226; Schultz 1793–1818, 1825–60; RX 243, RX 244, RX 248; RPXs 2, 6, 9, 13, 15, 16, 17, 18). Nevertheless, there is evidence of the existence of certain features common to the production of both products.

269. Prior to the merger, respondent's Corporate Development Department reported:

> The manufacturing process for exhaust and shocks are very similar, with both products starting from sheet steel that is welded into tubing. This probably is the most important common manufacturing process and one in which Walker has a great deal of proprietary knowledge. Other metal components are fabricated by machining, forming or shaping, and are assembled or attached together. The [58]exhaust systems probably require more forming and welding, whereas the shock requires more machining, some wire processing, and some hydraulic work. Regardless of the detail process, both products are metal fabricated products with very similar technology and production skill requirements.

(*See* CX 4F; CX 5Z; CX 21D; CX 20G; CX 21D; CX 142F–G; Givens 438–39, 484–85; Baker 712–13)

270. Both shock absorbers and all major ESP components (mufflers and exhaust, connecting and tail pipes) require the use of a pipe or tube mill as a basic manufacturing unit (CX 4F; CX 8; CX 15J; CX 142F; CX 208Z–24–Z–25, Z–37–Z–28, Admission Nos. 237, 240, 254, 257; RPX 2; RX 244; Givens 408–10, 438, 480–81, 539; Pond 755; Putman 1134; Moore 1289; Schultz 1795, 1799–1800, 1834–35; Buck 9383–84; Nelson 10,169–70).

271. Tube mill production represents 25–30% of the material value cost of a shock absorber (Givens 410, 438; Pond 775; Buck 9384;

Nelson 10,169). Of the total cost of a shock absorber, tubing represents approximately 13–14% (Hegel 2067–68, 2070).

272. The tubing in exhaust pipes, connecting pipes and tail pipes constitutes virtually the entire material value of those components (Givens 410; Schultz 1795–99; Buck 9384). In the case of mufflers, which consist of a combination of tubing sections, small stamped parts, and a formed shell and which are assembled by use of welding techniques and in some cases, metal-forming closure techniques,[92] tubing constitutes approximately 25% of the material value (Givens 410, 438).

273. It is possible for the same tube mill to produce tubing for both shock absorbers and the pipe portion of ESP (CX 4F; CX 8; CX 21D; Putman 1134; Hegel 2211–12; Nelson 10,169). For a period of one and one-half to two years, Questor utilized a common facility to produce both some of its ESP pipe and all of its shock absorbers (CX 42B; Putman 1134, 1156–57). Subsequent to the acquisition, as of July 1, 1978, a Walker tube mill was in the process of being physically transported to Monroe's Paragould, Arkansas plant, for attempted use in shock absorber manufacture (Hegel 2211–12).

274. The manufacture of both ESP and shock absorbers requires tube cutting and minor stamping operations (RX 244; **[59]**Givens 401, 409–10, 484; Schultz 1802–04, 1807, 1817–18, 1826, 1836; Hegel 2138–39). Both also require the extensive use of welding, and both also use drawing, swedging and chrome plating operations in their manufacture (CX 15J; CX 208Z–25–Z–26, Admission Nos. 244–45, 248; Givens 409–10, 424–25, 479, 484; Moore 1289; *see* Schultz 1797, 1804, 1825–26; Hegel 2145).

275. Such minor stampings are produced on standard type punch presses or stamping presses (Givens 401; Schultz 1817–18). Both shock absorber and ESP producers commonly manufacture the required minor stampings in-house (RX 244; Givens 401–02; Schultz 1802–04, 1817–18, 1830, 1836).

276. On the other hand, respondent argues that merely because the above operations for making shock absorbers and ESP may be described by the same "generic names," this is not determinative of whether they are technologically similar as a practical matter. The testimony put forth by respondent's technical witnesses was that a great deal more precision and sophistication was required in the manufacture of shock absorbers.[93] Three of the areas identified, for

[92] (RPX 2; Givens, 409; Pond 775; Schultz 1754–55, 1800, 1802–06, 1836).

[93] RRPF 109: ". . . [M]onroe's minor stamping operations are of a completely different nature. For example, the spring disc is made to a thickness of .0012 inches with precision diameter and holes. It is made on a high speed automated press which turns out the parts at the rate of three or four a second (Hegel 2022). Another precision stamping is the rebound valve spring seat" (Hegel 2032).

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example, by Monroe's chief engineer (for advanced engineering and research), Mr. Hegel, were welding (2069–70),[94] tolerances in testing (2038; *see* Tompkins 2358), as well as the precision stamping described in the first footnote in this finding (Hegel 2022–23, 2032, 2039–41, *in camera*).

277. There are at least some commonalities in research and development technology regarding shock absorbers and ESP (CX 5–A; Givens 484–85).[95] A Walker study states: "Walker exhaust system research utilizes dynamics of sound dampening, which is quite similar to theory of motion vibration utilized in shock absorber research" (CX 15J; Givens 484). Walker's **[60]**President, Mr. Tom Cook, cited compatibility in research and development for the two products in his presentation to the Tenneco Board seeking authorization to acquire Monroe (CX 20G; CX 21D). Commonality in research and development is shown in the instance of Maremont's engineering and product development staff, whose services are expected to, and do encompass both shock absorbers and ESP (Givens 395–96, 484–85; *see* Buck 9424).

B. Distribution

278. Shock absorbers and ESP are distributed through identical channels from the manufacturer to the consumer (CX 4G; CX 5P–R; CX 15D–E; CX 20G; CX 21D; Baker 589, 664; Moore 1248; Cook 1586; Bush 3259–60; Fleuelling 5774–75; *see* flow chart, CX 5Q).

279. In the traditional wholesale channel of the independent aftermarket, shock absorbers and ESP are sold by manufacturers to WDs, who in turn distribute these products to jobbers for resale to garages, service stations, etc., for installation on the vehicles of ultimate consumers (Baker 664; Moore 1248; Cook 1586; Bush 3259–60; Fleuelling 5774–75).

280. In the retail channel of the independent aftermarket, both products are sold directly to mass merchandisers, chain stores, tire companies, and muffler specialty installation chains (CX 3C; CX 5P–Y; CX 15D–F; Moore 1248; Kittridge 1415–16; Jaffe 2804; McAdams 8988; Fleuelling 5780–81; Garfinkel 9206).

281. Shock absorbers and ESP are products of major importance carried by WDs, certain mass chain merchandisers such as Sears, and muffler installation shops (Baker 540–41; Verner 883; Nedell 929; Glassman 1019, 1034, 1068; Bush 3297, 3315; Terryl 4451).

282. However, as respondent points out, shock absorbers and ESP

[94] Witness Givens, formerly vice president in charge of research and engineering at Maremont described the welding processes for ESP and shock absorbers as "in general, similar" (Givens 410).

[95] Respondent's witness Mr. Hegel, however, saw "very little" in common (Hegel 1937).

are not sold to all classes of customers in equal amounts. For example, the M.E.M.A. data for 1975 shows that, as between warehouse distributors and nontraditional national accounts, more than 67% of all mufflers and 83% of all pipes were sold to traditional customers (CX 121C). In the same time period, M.E.M.A. data shows that less than 38% of all shock absorbers were sold to warehouse distributors (RX 30E–H). In the nontraditional channel, ESP sales are largely to muffler shops, while in excess of 90% of nontraditional shock absorber sales are to mass merchandisers (RX 232; RX 550D; RX 551A–C *in camera;* RPF 315). **[61]**

283. There was testimony by certain WDs[96] that, on an inventory average, ESP ranked at or near the top of all automotive products in terms of total WD sales, at or around 10%, whereas shock absorbers accounted for but 3–5% of sales (Bush 3297, 3315; Stapleton 3476–79).

284. Successful competition in replacement sales of both shock absorbers and ESP requires the ability to supply in a relatively short period of time; an order fill of close to 100%; and national distribution (CX 4F–G; CX 15D–E; CX 27N; Baker 544–45, Pond 777–79; Moore 1235–36, 1248; Cook 1627–28, 1630–32; Stapleton 3477).

285. There is testimony and documentary evidence in the record that shock absorbers and ESP can sometimes be effectively combined in one distribution and delivery system (CX 4F–G, CX 5P–R; CX 13A–B; CX 15D–E; CX 205; Baker 589–90, 666–67; Glassman 1036–37; Moore 1218–19, 1234–36; Cook 1625–26, *but see* 1635; Nelson 10,247, *et seq.*).

286. Witnesses attested to similarities in warehousing and handling both products (Baker 589; Pond 756; Moore 1218, 1234, 1236; *see* CX 13A. With respect to this, Midas' Mr. Moore stated:

> They [are] relatively easy to handle. In fact, shock absorbers and mufflers are not dissimilar. They are both boxed, palletized, and can be moved by forklifts, and are relatively easy to handle from a material handling standpoint. The warehousing technique would be very similar. Shock absorbers and mufflers would both go into—can be stacked very high, good cubing utilization out of them.
>
> Their out processing from the standpoint of order picking and loading back onto a trailer for a customer order are similar.

(Moore 1236)

287. Both shock absorbers and ESP can be and are stored by manufacturers in regional warehouses (CX 13A; CX 205; Pond 756; Verner 886–87; Nedell 935; Putman 1104–05, 1108, 1118; Moore

[96] Only four WDs testified in this case, Messrs. Bush, Stapleton, Kornafel and Fauty (*See* Appendix A to RPF).

1218–19). Prior to the Monroe acquisition, three of Walker's regional warehouses handled and shipped together both shock absorbers and ESP (CX 13A; CX 208K, Admission No. 22; Cook [62]1635; Jaffe 2804; Teryl 4467; Nelson 10,197; Ashford 11,538). In addition, Walker was considering the use of its ESP distribution facilities to distribute Monroe shock absorbers (CX 4F; CX 208Z–30, Admission Nos. 271–72). A single distribution system for both shock absorbers and ESP was proposed by transferring a portion of Monroe's warehousing and physical distribution functions for shock absorbers to Walker's existing ESP distribution facilities (CX 5V; CX 208Z–30, Admission Nos. 271–272; Ashford 11,460, 11,466). It was recognized by Walker that Monroe's three production facilities "are reasonably close to our existing shipping and manufacturing facilities, and it is proposed to warehouse and ship their products from our distribution points" (CX 4G, K; CX 5V, Y, Z–14–Z–16). Subsequent to the acquisition of Monroe, a major portion of the warehousing and shipping function for Monroe shock absorbers was transferred to the Walker distribution centers "with very little additional fixed cost" (Cook 1625–26; Fleuelling 5786–87; Nelson 10,197; Ashford 11,460). Thus, currently all Walker distribution centers contain both ESP and shock absorbers (Cook 1625–26; Fouty 9475, 9492–93).

288. Walker, by warehousing and distributing all aftermarket shocks sold by Monroe, projected annual cost savings from lower freight costs to be $495,000, and annual savings of $100,000 by combining Walker's and Monroe's traffic departments (CX 208Z–31, Admission Nos. 275–277; *see* CX 5X, Z–14; Ashford 11466).

289. All of Maremont's field warehouses store and ship ESP and shock absorbers together (Pond 756, 762; Nedell 935–36; Glassman 1037; Stewart 9281). Maremont makes combined shipments of shock absorbers and ESP to its nontraditional accounts and combined shipments of its shock absorbers and its World Parts line, which includes ESP to WDs (Pond 762; Nedell 935–36; Glassman 1037; Kornafel 9431; Fouty 9475–76; Nelson 10943–44). Arvin's replacement warehouses handle both shock absorbers and ESP and ship them together to the nontraditional channel of distribution (Verner 887, 892, 921; Glassman 1037; Cook 1635; Nelson 9857). Questor has nine distribution centers which warehouse and combine shipments of both shock absorbers and ESP (CX 205; Glassman 1037; Putman 1104–05, 1108, 1118; Teryl 4433–34, 4465; Garfinkel 9207). Midas operates eight warehouse locations which serve both its muffler installation shop franchisees and its WD customers (Moore 1234–35). Each of these locations warehouse both shock absorbers and ESP and ship them to all of Midas' customers (Moore 1234–35; Nelson 10,960).

290. There was testimony that on shipments of shock absorbers and ESP, these products are generally received on the same dock, warehoused in the same facility, handled by similar personnel in the warehouse and, in the case of WDs, reshipped together from the same dock to jobbers or retail outlets (Goodman 9077–79; Kornafel 9441–43; Fouty 9493–94, 9500). **[63]**

291. Use of common shipments of ESP and shock absorbers can result in outbound freight savings, as shock absorbers can be added to an ESP shipment for virtually no additional cost (Baker 576, 589–90, 666–67; Nedell 936, 955–56; Moore 1236; Kittridge 1416–17; Cook 1634; Teryl 4466; Nelson 10257 *et seq.;* Ashford 11,466–68). If only ESP are shipped, a manufacturer may pay for a full weight load (24,000–30,000 lbs.), even though a van filled with these bulky parts may weigh less than the maximum truck load weight (CX 208Z–32, Admission No. 281; Kittridge 1416–17; Cook 1634; Teryl 4466; Nelson 10,257–61; Ashford 11,466). If both shock absorbers and ESP are combined in a single load, the high weight density of the shock absorbers in comparison to ESP would operate to raise the load weight up to the legal limit with little sacrifice of carrying capacity for ESP, thereby achieving several thousand pounds of additional freight at no additional cost (CX 4G; CX 5V, X; CX 13A; CX 77; Baker 576; Moore 1235–36; Kittridge 1415–17; Cook 1634; Teryl 4466; Kornafel 9436; Nelson 10,257–61; Ashford 11,466).

292. Combining shipments of ESP and shock absorbers to mass merchandisers and muffler installation shops, even for "LTL" (less-than-trailerload) shipments, enables customers to place orders more frequently, resulting in a reduction in inventory, and hence costs, and in obtaining more complete order fill (CX 4G, P; CX 5X, Z–13–Z–14; Verner 919–20;, 922; Nedell 956; Glassman 1021; Cook 1632; Garfinkel 9207; Nelson 9853–54, 10,257; Ashford 11,537). The ability to obtain combined shipments of LTL lots is especially important to a muffler installation shop in its first few months of business operation where merchandise is frequently ordered in small amounts (Nedell 956; Nelson 10,628–29).

293. There was testimony that the ability to offer combined ESP and shock absorber shipments is of some advantage to the manufacturer in obtaining new customers in the nontraditional channel and in retaining old ones (Pond 763–64; Kittridge 1415–18; Jaffe 2805–06; Teryl 4433–34, 4466; Nelson 9977, 10,198, 10,262). many buyers of shock absorbers prefer to buy both shock absorbers and ESP from the same source (Verner 887; Nedell 936; Glassman 1020–21, 1027; Kittridge 1415–18; Jaffee 2805–06; Nelson 9977). In purchasing shock absorbers and ESP from a single source, a firm can save

administrative expense by having only one order to place, one invoice and freight bill to check, and the ability to qualify more easily for maximum discounts and prepaid freight (Pond 763; Verner 887; Nedell 936; Glassman 1021, 1037–38; Moore 1246–47; Kittridge 1415–17; Jaffe 2805–06; Teryl 4466; Garfinkel 9207; Nelson 9853–54, 9977, 10,257–58; Ashford 11,537). There was evidence that the lack of facilities for combined distribution and shipment of ESP and shock absorbers cost Monroe the J.C. Penney account (CX 5X; CX 21E; *but see* Ashford 11,544–45). **[64]**

294. As noted, purchasing combined shipments of ESP and shock absorbers could result in a lowering of costs for a customer buying in trailerload lots in a number of ways (Fleuelling 3966, 5789; Teryl 4465–66; Nelson 10,271–72; Ashford 11,537). WD witnesses testified that, on payment terms for shipments of Walker's ESP, a WD receives a 15–16% discount and no dating for LTL shipments, but discounts of 22% to 25% and extended dating terms for full trailer load shipments (Kornafel 9436; Fouty 9490–91). Monroe also offers WDs extended discounts and dating terms on truckload shipments (Stapleton 3496; Kornafel 9437; Fouty 9491–92; Ashford 11,498). A full load truck also requires less time in transit, inasmuch as intermediate stops are eliminated (CX 5Z–14; Nelson 10,272).

295. Prior to the merger, Walker considered combined order processing for shock absorbers and Walker ESP, and incorporating shock absorbers into its computer system (AIMS) with ESP, "which would also result in better customer service and in turn should result in greater market penetration" (CX 4G).

C. Marketing

296. The record demonstrates the existence of similarities and compatibilities in the marketing of shock absorbers and ESP to the replacement market (CX 4E; CX 5P; CX 7; CX 20G; Bush 3305–06; Stapleton 3477; Buck 9385–86). Prior to the merger, Walker's management was of the opinion that shock absorbers would be the product most likely to enhance Walker's "superior distribution and marketing system used for exhaust systems" (CX 3B). A Walker study stated:

Marketing

Monroe and Walker sell to many of the same customers, and we feel there could be some plusses if there was one merged company. In addition, our selling programs, discount structure, and customer financing philosophy are very similar and would require little or no change in order to fit together. Walker's marketing programs stress customer service, while Monroe is promotion oriented. These differences are

due to the nature of the two products. Both companies can benefit by sharing these respective strengths in the future.

(CX 4E)

Walker's president, Mr. Cook referred to this marketing similarity in his presentation to the Tenneco Board seeking authorization to acquire Monroe (CX 20G; CX 5). [65]

297. Both replacement shock absorbers and replacement ESP are sold to many of the same customers (CX 4E; Buck 9385; Nelson 10,199; Ashford 11,466). Prior to acquiring Monroe, Walker and Monroe had a number of customers in common (CX 4E; Ashford 11,466). In fact, Walker planning officials compiled a listing of Walker's 50 largest ESP wholesale accounts, indicating the shock line that each carried. Of the 50, 37 are shown as carrying Monroe shocks (CX 4E, Z–2–Z–4). Similarly, a list of Monroe's major wholesale brand accounts was drawn up, indicating the ESP line that each carried. Of the 29 companies named, 15 were identified as Walker customers in whole or in part, nine carried no Walker ESP, and five handled no ESP line (CX 5Z–10; see CX 100A–G "Walker Customers Without Monroe Shock Line" and CX 101A–G, a list of Monroe Warehouse Distributors purchasing over $100,000 from Walker as of November 1976).

298. Replacement shock absorbers and ESP are marketed to the wholesale trade through similar selling programs, discount structures and customer financing arrangements (CX 4E, CX 5R; Baker 589–90; Bush 3305–06; Stapleton 3477; Fleuelling 5773–74; Buck 9385; Nelson 10,200–02, 10,298–300, 10,921; *see* Baker 713; Barna 1353). Cultivation of accounts by manufacturers is important in the sale of both ESP and shock absorbers, as is inventory availability and service (Baker 544–45, 553–55, 567–68; Nelson 10,921, 10,950–51). Prior to acquiring Monroe, Walker envisioned the consolidation of Walker and Monroe's promotional efforts, including advertising departments, market research departments, as well as the two firms' NAPA and national accounts sales forces (CX 5E; CX 5Z–16–17).

299. Prior to the acquisition, Walker and Monroe advertised their respective replacement lines in trade journals such as Jobler Topics, Motor and Motor Age (CX 316A–D; CX 317A–C; CX 318A–D; CX 319A–C; CX 328A–C; CX 329A–D; CX 330A–D; CX 331A–D; CX 333A–C).

300. Neither Questor nor Maremont, the two firms in addition to Tenneco which manufacture both shock absorbers and ESP, presently employ a joint sales force in the traditional wholesale channel[97]

[97] Maremont has been doing this, however, in Hawaii on a test basis "for some period of time." At the time of the hearings, Maremont was also using a combined wholesale sales force in Montana (Pond 754, 819).

(Pond 752–54; Putman 1158–60). In the early 1960's, following its acquisition of Gabriel, Maremont unsuccessfully attempted to service this channel with a combined sales force (Pond 819). The effort was abandoned when it did not result in an increased market penetration in shock absorbers **[66]**(Buck 9408).[98]

301. Walker employs the same sales personnel to sell both jacks and ESP to traditional aftermarket customers. This arrangement was described in Walker's 1976–81 Five Year Plan as having "served as an entree for gaining new exhaust customers" by affording "an opportunity for a Walker salesman to promote the Walker exhaust line when making a jack sales call" (CX 27R; Nelson 10,196).

302. In the nontraditional channel, both Maremont and Questor utilize a single sales force to sell both ESP and shock absorbers to their mass merchandiser accounts (Putman 1158; **[67]**Schubert 8545 *in camera;* Stewart 9284, 9288; Nelson 10,198–99).

303. ESP and shock absorbers, along with other automotive products, are often advertised jointly in promotions by retailers such as Sears, K-Mart, Goodyear and Montgomery Ward (CX 195; CX 196; CX 275; CX 320; CX 340; CX 341; CX 348).

304. ESP and shock absorbers are compatible from the standpoint of replacement installation (Moore 1287; Jaffe 2794, 2806; Buck 9385–86; Nelson 10,122. Both ESP and shock absorbers can be categorized as "under-the-car" service parts, which are subject to the same environmental and repair conditions, and which are replaced by the same person, whether a service station mechanic, a mass merchandiser employee, a specialist installer or a "do-it-yourselfer" (CX 5P, Q; CX 15J; Baker 667; Verner 884; Nedell 930–31; Glassman 1009; Moore 1235; Kittridge 1449–50; Jaffe 2794–95, 2806; Fleuelling 5768–69; Buck 9385–86; Goodman 9068–70). Among "under-the-car" type parts are ESP, shock absorbers, brakes, and front-end items such as suspension parts (Moore 1293; Glassman 1000, Teryl 4430, 4435, 4437, 4486; Fleuelling 5768–69). Of these products, according to

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[98] Under the arrangement, Maremont ESP and Gabriel shock absorbers, together with brake linings and rebuilt parts, were sold by one sales force under the brand name "Maremont". Mr. Buck explained:

THE WITNESS: It was difficult to try to sell them together. In other words, no one had ever heard of a Maremont shock absorber. And there wasn't any public acceptance of that, per se.

And just because Maremont made exhaust system parts didn't excite the aftermarket about the fact that they had a shock absorber available.

So as a result, nothing happened. It just—things went along as they were. We didn't have any good shock absorber accounts at the beginning, and we didn't get any more by using the name Maremont.

BY MR. JEFFERS:

Q. So you went back to the name, Gabriel?

A. Right.

(Buck 9408)

Thereafter separate sales forces were used to sell the two brands, and Mr. Buck testified that he believed this to be the more successful marketing method. It should be noted that no attempt was made during this time to use one sales force to sell under both the Gabriel and Maremont brand names (Buck 9406–09).

the record, only ESP and shock absorbers can be and are installed by persons who do not possess any special mechanical skills, but are willing to do dirty work (Pond 822; Verner 884; Nedell 930–31; Glassman 1001, 1005–06; Moore 1244; Jaffe 2806, 2808–09; Garfinkel 9209; Buck 9386).[99] The main tools used to install ESP and shock absorbers are identical, namely air guns, torches and socket wrenches (Verner 883–84, 913; Glassman 1000–01, 1010; Teryl 4473). For a shop installing ESP, shock absorbers can represent an "add on" sale that increases revenues (CX 109L–M; Verner 883; Nedell 930; Glassman 1009; Moore 1304; Cook 1665; Jaffe 2806). Shock absorbers and ESP have a similar life expectancy, and thus tend to need [68]replacement at the same time (Verner 883, 915–16; Glassman 1014).[100] Once a car is on a lift for ESP work, the mechanic can easily determine visually whether the shock absorbers need replacement, can demonstrate that need to the customer, and can often expect a sale (Verner 883–84, 886; Nedell 982; Glassman 999–1000, 1013; Putman 1147–48; Moore 1236–37, 1304; Jaffe 2788–89, 2794–95; Teryl 4437–38; Fleuelling 5769).[101]

305. Walker believed that due to the compatibility of the product lines, offering a combination of ESP and shock absorbers would enhance its penetration of the wholesale and retail channels of distribution, but particularly of the faster growing retail segment of the replacement market (CX 4L). Maremont previously had used its ESP contacts in the retail segment to enhance its sale of shock absorbers to that segment of the replacement market (Buck 9419).

306. Muffler installation shops represent the fastest growing retail segment of the replacement ESP market (CX 103E, G; CX 349, p.18; RX 232A–D *in camera;* Pond 822–25; Verner 887; Nedell 928–29, 973; Glassman 1086; Cook 1656 *in camera;* Jaffe 2785, 2807; Nelson 9849, 10,997–98; Ashford 11,420). As of 1966, such shops represented 14% of all ESP installations; by 1977 this figure had grown to 16.2% (CX 27H; RX 232C *in camera;* Nedell 937; Cook 1656 *in camera;* Nelson 9846–48 *in camera,* 9871; *see* Fleuelling 3970). Muffler shop chains such as Midas, Tuffy and Meineke have

[99] Compared to other "under-the-car" work, the installation of shock absorbers and ESP are not labor intensive (Verner 894; Glassman 1003, 1010). In contrast, brake work, transmission work and front-end work are considerably more labor intensive and require more highly skilled and higher paid mechanics, as well as a good deal of specialized equipment (Verner 895; Moore 1244; Jaffe 2808–09; Teryl 4473, 4475, 4478–79, 4494; Bryant 4777, 4796; Garfinkel 9209; *see* Teryl 4444–45). In many states brake mechanics are required to be certified because of the fact that brakes are vital to the safe operation of a vehicle (Glassman 1004–06).

[100] In contrast to ESP and shock absorbers, suspension parts have a much longer expected life, so a shop would expect to replace fewer of these on cars that come in for service (Glassman 1015).

[101] At muffler installation shops, most shock absorbers are sold to customers who originally come in for ESP work, since it is generally difficult for car owners to determine whether or not new shock absorbers are needed, in contrast with audibly-detected ESP defects (Verner 886; Nedell 932; Glassman 1012; Moore 1236–37, 1304–05; Jaffe 2794–95, 2798).

experienced rapid growth since 1970 and they, along with Walker (Cook 1596–97, 1654), project continued growth (Verner 888; Nedell 928–29; Moore 1222; Cook 1662). In part such growth has been at the expense of other installers, such as service stations, many of which have either closed or ceased performing ESP services (CX 27H; CX 103E, H, K; RX 232C *in camera;* Verner 887–88; Nedell 937; Glassman 1086; Cook 1657–58 *in camera;* Ashford 11,420; *see* Jaffe 2807–08).

307. The marketing methods and experiences of muffler specialty shops such as Midas, Tuffy, Car-X, Meineke, Rayco and Walker's own Speedy Muffler King demonstrate the compatibility **[69]**between shock absorbers and ESP (Verner 889; Nedell 937–38; Glassman 1010; Moore 1235; Jaffe 2788–94; Buck 9386; Nelson 9850–52, 11,004). Shock absorbers are normally the first products to be taken on following ESP, and are the only products other than ESP that are universally installed in muffler specialty shops (CX 4I; CX 5P; CX 113B; Baker 667–68; Glassman 1009–10, 1044; Putman 1145, 1177; Moore 1233, 1235, 1249; Jaffe 2788, 2794, 2797; Teryl 4430, 4432; Nelson 9850, 10,122; *see* CX 109M, R).

308. Walker has recognized this compatibility by stocking shock absorbers along with ESP in its distribution centers for sale to Speedy King and Car-X muffler shops (CX 13A; Jaffe 2804; Teryl 4433–34; Nelson 9857). Walker's Speedy Muffler King operation has advertised the availability of all types of shock absorbers, including MacPherson struts (CX 207).

309. As of June 1976, Walker's Speedy Muffler King installation shops were to offer only ESP, shock absorbers and cargo coils (CX 111; CX 113B; CX 207; Ashford 11,511). Specific written permission for an outlet to perform other automotive work or sell other automotive parts was needed from the President of Speedy Muffler King (CX 113B).

310. Since at least 1974, Walker has been considering entry into the muffler shop business in the United States (Cook 1651 *in camera*). Such consideration was generated by the increasing share of ESP work performed in such outlets (Cook 1659 *in camera;* Nelson 10,997–98; Ashford 11,420, 11,424).

311. In 1976, Walker determined that it ". . . must enter the muffler shop segment of the muffler replacement market," and had Tenneco's approval to enter (CX 108N, P; Ashford 11,507–10). When Walker was considering the purchase of Monroe, belief was expressed that shock absorbers would support this approved move into the U.S. retail market (CX 3C; CX 4I). In 1976, Walker purchased shock absorbers from Monroe for resale through Walker's ware-

houses to Speedy Muffler King shops in Canada, and also for sale to Car-X in the U.S. (CPF 79, 81; CX 166; Nedell 942–43; Jaffe 2804–05; *see* Putman 1140).

312. Prior to acquiring Monroe, Walker sought to acquire Car-X, a chain of 60 muffler specialty shops operating in 10 states, which Walker planned to expand into a national chain (CX 4I; CX 108C, P; CX 109C; Jaffe 2782). In addition to ESP, each Car-X shop sells shock absorbers (Jaffe 2788, 2803). Approximately 15% of the inventory of a mature Car-X shop consists of shock absorbers while shock absorbers constitute 7.5%–10% of a shop's initial inventory (RX 269; Jaffe 2796, 2803–04). Car-X originally purchased ESP and shock absorbers from Arvin, but in mid-1974 switched its source of supply of ESP to Walker (Jaffe 2793, 2805). Since 1974, Walker has remained Car-X's supplier of ESP and shock absorbers (Jaffe 2793–94, 2804–05). Shock absorbers, the only product other than ESP sold by [70]Car-X, account for approximately 7% of Car-X installation shop sales (CX 108"O"; CX 110A; Jaffe 2788; *see* CX 109R).

313. At the time of trial, Walker had begun an operation to open a network of company-owned Speedy Muffler King muffler installation shops in the United States. It plans to sell only two principal products in these outlets: ESP and shock absorbers (CX 27L; CX 349; Verner 891; Nedell 942–43; Putman 1137; Moore 1222; Cook 1571, 1649–50, 1662–63, 1669; Nelson 9858–59, 9866, 9868, 10,997; Ashford 11,510). Walker has had one Speedy Muffler King shop in the United States for several years (CPF 11; Moore 1223; Cook 1651 *in camera*). In 1978, Walker started to open more Speedy Muffler King shops in the United States (CX 207; Moore 1225; Cook 1651 *in camera;* Teryl 4495; Ashford 11,510).

314. Midas is the largest franchisor of muffler specialty shops, having approximately 911 locations throughout the U.S. (Verner 889; Moore 1221–22; Nelson 10,994 *in camera*). For many years all Midas shops have installed shock absorbers as well as ESP (Moore 1233). Less than one half the Midas shops have sold a limited amount of brake parts (Moore 1243, 1272). Approximately 20% of the Midas shops perform front-end work (Moore 1243–72). Midas sells virtually nothing in the way of brake parts and chassis parts to its shops, but has very substantial sales of shock absorbers to them (Moore 1243, 1245, 1272; Poe 8949). Midas has tried to promote brake and front-end work at its shops, but has met only limited success in brakes and no success in front-end work (Moore 1245). Midas shops prefer to concentrate on ESP and shock absorber replacement rather than brake and front-end work as those items generate twice as much revenue per hour as would brake or front-end work (Moore 1245).

315. Tuffy Service Centers, Inc. (hereinafter "Tuffy") began business in 1970 (Verner 879). By 1978, Tuffy had 82 outlets, all of which installed both ESP and shock absorbers (Verner 878–79, 882, 889; Moore 1281). The opening inventory of a Tuffy franchise consists of $18,000 worth of ESP and $2,000 worth of shock absorbers (Verner 879). Although some Tuffy franchisees perform other automotive work, the only products Tuffy supplies are ESP and shock absorbers (Verner 879, 882, 896). Tuffy attempted and failed to sell brake parts to its franchisees (Verner 895). It attributes such failure to the unwillingness of its franchisees to stock brake parts because of the cost of such inventory, the easy availability of these parts from jobbers, and the relatively small portion of the shops' total work represented by brake work (Verner 895–96). In addition to installing shock absorbers and ESP, a number of Tuffy shops offer brake services and some offer various other types of automotive services (Berner 882). Within the Tuffy franchise system, ESP accounts for 85% of service sales, shock absorbers for 10%, and the remainder, primarily brake work, accounts for 5% (Verner 883, 885–86, 914, 881 *in camera;* [71]Nelson 9856). For the Tuffy company itself, 9% of its sales of merchandise to its franchisees in 1976 consisted of shock absorber sales (Verner 88A *in camera*).

316. Meineke Discount Muffler Shops (hereinafter "Meineke") commenced its operations in 1972 (Nedell 925). By 1978, Meineke had almost 90 franchisees throughout the country (Nedell 925). The only products installed by these franchisees to any extent are shock absorbers and ESP (Nedell 929, 954). All franchisees sell and install both products (Nedell 929). Meineke promotes both ESP and shock absorbers in all its newspaper ads, yellow page ads and in most of its radio commercials (CX 204A–B; Nedell 933–35, 980–81). Ads that feature shock absorbers represent 35–40% of Meineke's total advertising budget (Nedell 983). The opening inventory of a Meineke franchise consists of $7,500–7,600 for ESP and $1,200 for shock absorbers and hardware items (Nedell 929–30, 980). For 1977, shock absorber installation represented 6.5% of the average Meineke franchisee's sales (Nedell 929, 978). However, established Meineke franchisees average 12% or 13% in sales in shock absorbers (Nedell 982; Nelson 9856–57).

317. Meineke considered and rejected selling brake parts (Nedell 931). One reason for the rejection was the higher skill and consequent higher level of payment required for brake mechanics (Nedell 931). Meineke's franchise currently prohibits its shops from doing brake work (Nedell 955). Meineke shops do not do any work that requires oil or transmission fluid such as filter changes or

transmission repair, as these are a "different business altogether" (Nedell 932; *see* Glassman 1002). One reason for this is that to perform such work would require the franchisees to carry more inventory. The second reason is that the buildings housing the franchisees are unsuitable and not zoned for handling fluid (Nedell 932). Fluid handling would require expensive drainage traps in the ground. These traps are lacking in the buildings of Meineke's franchisees (Nedell 932).

318. Rayco shops installed basically ESP and shock absorbers. ESP accounted for an estimated 70–75% of these shops' mechanical work, with shock absorbers accounting for approximately 20% (Glassman 1019). These shops almost never did transmission work, because of the higher profits and turnover in ESP (Glassman 1017). Likewise, Rayco shops do not replace oil filters because of danger from torches used in ESP and shock absorber installation (Glassman 1017–18).

D. Common Competitors and Customers

319. The compatibility existing between ESP and shock absorbers is further demonstrated by the fact that all significant ESP producers manufacture and/or market shock absorbers (CX 208Z–34Z–35, Nos. 290, 292, 294, 296; Givens 438–39; [72]Baker 535, 537, 575, 590; Moore 1248; Barna 1353). As one producer stated:

> Obviously it [the combined sale of ESP and shock absorbers] is compatible. The economic history tells us it is compatible. Why did Maremont do it, why did Arvin do it, why did AP [Questor] do it, why now has Walker done it?
>
> Companies don't just consistently make bad decisions. There is [sic] four companies that have all done the same thing in a little different way.

(Baker 590)

In the same vein, another producer stated:

> I think the marriage of shock absorbers and [exhaust] systems as being compatible lines is already established, because certainly, the AP, with their Columbus line, Maremont with their Gabriel line, did this for good, sound business reasons.

(Moore 1247–48)

320. Two leading firms, Maremont and Questor, which rank in the top four in the sale of shock absorbers and ESP to the replacement market, began as ESP producers, and subsequently acquired shock absorber companies (CPF 183, 257–58, 266; Givens 458, 461–62; Baker 715; Pond 741–44, 804; Putman 1095, 1109; Barna 1357; Teryl 4433). In both instances, the acquisition of a smaller

company was the starting point for such expansion (Pond 742; Putman 1109–1113; Nelson 10,214).

321. Prior to 1962, Maremont had examined several options for entering the replacement shock absorber market, including obtaining a license, or the purchase of a small company, Heckethorne (Buck 9384–85). Maremont management believed that entry into the replacement shock absorber market "was a logical adjunct to the Maremont exhaust system parts line due to the fact that it would be sold through the same types of outlets, and would require the same type of expertise for installation. And as a result, the same marketing approaches could be used for both products." (Buck 9385)

322. In 1960, Maremont acquired a 50% interest in the Gabriel Company ["Gabriel"], a producer of shock absorbers, and in 1962 acquired the company's remaining stock (Putman 1110–11, 1190; Buck 9369–70; Nelson 10,222; *see* Givens 461–62). Gabriel in 1962 ranked third in the replacement market, significantly behind the leading seller Monroe (Buck 9378; Pond 742, 805–07; Putman 1193; Barna 1359–60; Borick 4755–56; Nelson 10,223–24). **[73]**Prior to the Maremont acquisition, Gabriel was in financial straits, and its affairs were being administered by a CPA (Pond 804–05; Putman 1110, 1963; Buck 9381–82; Nelson 10,231–34, 11,166; *see* Borick 4757).

323. Gabriel shock absorbers have gained significant market share since the Maremont acquisition, in the sale of replacement shock absorbers (Pond 743, 857–58; Putman 1193; Fleuelling 4123; Nelson 10,235, 10,238, 11,092). Such gain has occurred both with respect to sales to the traditional channel of distribution, as well as to the nontraditional channel (Pond 743; Nelson 10,565, 10696, 10,947).[102]

324. As noted earlier, the ability to market is an indispensable factor to success in the sale of shock absorbers to the traditional channel (Buck 9372). At the time of its acquisition, Gabriel's marketing effort was considered by Maremont to be in "very poor" condition (Buck 9373, 9381). Gabriel was viewed as having "practically walked away" from selling shock absorbers to the traditional channel, in that it had only "a few WD customers" (Buck 9372–73, 9378; Nelson 10,222–23, 10,693–94). Indeed, Gabriel prior to the acquisition, had just lost its largest WD account, NAPA, to Monroe (Buck 9373–74, 9376, 9400; Nelson 10,232, 10,693).

325. At the time of the Maremont acquisition, Gabriel had already lost its Montgomery Ward business, but still retained the

[102] Sales of Gabriel shock absorbers to the nontraditional channel in 1976 constituted 55% of Maremont's shock absorber sales, in fact, a lower percentage than at the time Maremont acquired Gabriel (Pond 820; Buck 9372–73, 9417).

private label business of Goodyear and Goodrich (Buck 9373–74; Nelson 10,232). However, these two remaining accounts were threatening termination, and, in the opinion of a Maremont official then at Gabriel, would have left if Gabriel "would have continued to service the customers as they had been in the two or three years prior to Maremont's acquisition" (Buck 9373–74, 9378–79; Nelson 10,191–92, 10,233). Furthermore, prior to acquisition, Gabriel did not have the Sears Roebuck account (Pond 835; Putman 1110–11; Buck 9383; Nelson 10,567, 10,946–47).

326. Under Maremont's management, Gabriel became the leading supplier of replacement shock absorbers to the nontraditional channel (Nelson 10,192). Among its current customers is the Sears Roebuck account (Pond 793; Buck 9383; Nelson 10,567, 10,946–47). There was testimony that Maremont was able to achieve this increase in Gabriel's sales of shock absorbers to such accounts in part due to Maremont's contacts **[74]**with its ESP customers (Buck 9383, 9419; Nelson 10,191–92, 10,236–37).

327. The record shows that at the time Maremont was increasing its share of the U.S. replacement shock absorber market, it was also increasing its share of the U.S. replacement ESP market (CX 353; Moore 1275; Buck 9389; Nelson 11,023). Such increase has occurred in both the traditional channel and the nontraditional channels (Moore 1275). As to the latter, Maremont acquired Sears' ESP business in the early 1970s (Putman 1195; Nelson 10,946, 11,156).

328. The record likewise shows that Maremont, after acquiring Gabriel, expanded its manufacturing facilities substantially (Buck 9372, 9413, 9423; Nelson 10,234–35). The only shock absorber plant operated by Gabriel prior to its acquisition was its Cleveland facility (Buck 9383; Nelson 10,234). The Gabriel Pulaski shock absorber plant under construction at the time of acquisition was completed by Maremont (Buck 9371; Nelson 10,234–35). Neither Gabriel's Cleveland plant nor that at Pulaski was envisioned by Gabriel as having tube mills (Buck 9383; Nelson 10,234). Subsequently, Maremont added tube mills to the Pulaski plant to reduce production costs (Buck 9383–84; Nelson 10,234).

329. The replacement shock absorber product line of Gabriel was substantially expanded under Maremont's ownership (Nelson 9690–91, 10,236). Prior to acquisition, Gabriel did not offer a line of spring-assisted shock absorbers, nor an adequate line of air shock absorbers (Buck 9375–77; Nelson 9690–91, 9693, 10,234). Since Gabriel's replacement customers desired a line of spring-assisted shock absorbers, Maremont added such products (Buck 9377; Nelson 9674, 9690–91; 9693, 10,236). Maremont also helped Gabriel reengineer

and develop a satisfactory line of air shock absorbers (Pond 778; Buck 9377; Nelson 9690–91, 10,236).

330. Following the acquisition, in an effort to improve Gabriel's operations, Maremont installed as officers of Gabriel members of its own top management (Buck 9365–67, 9370–71; Nelson 9674, 10,192). Two of Gabriel's new chief officers, Mr. Comar and Mr. Buck, were designated as senior Maremont officials (Buck 9370–71). Mr. Buck, with an extensive background in ESP design, testing, production and warehousing, was placed in charge of Gabriel's marketing, engineering and manufacturing operations (Buck 9365–67, 9370–72). Maremont's Marketing Vice President, Mr. Klaus, reorganized Gabriel's marketing efforts (Buck 9380; Nelson 9674). Mr. Klaus placed Mr. Carlton, whose background was in ESP sales, as the official in charge of Gabriel's marketing to the traditional channel of the replacement market (Buck 9380; Nelson 9674).

331. In 1958–59, Questor's predecessor, AP Parts, acquired Heckethorne Manufacturing and Supply ("Heckethorne") **[75]**(Putman 1109, 1180; Barna 1357; Teryl 4433; Buck 9384; Nelson 10,214). AP Parts decided to expand its product market into auto parts lines, specifically "under-the-car" type parts, to reduce its dependence on ESP, which then accounted for 95% of its business (Putman 1111–12). After much investigation and customer research, AP Parts decided to acquire a shock absorber manufacturer, as the next logical step in its expansion (Putman 1111–12).

332. At the time of its acquisition, Heckethorne sold only through WDs and jobbers (Putman 1112, 1186 *in camera;* Nelson 10,216). Heckethorne accounted for less than 5% of shock absorber sales to WDs and jobbers, and a much smaller percentage of total replacement shock absorber sales (Putman 1113, 1180; Barna 1358; Nelson 10,214–15, 10,933–34 *in camera,* 11,027 *in camera*).

333. Heckethorne not only had a small market share, but it also lacked capital, lacked a minimum efficient scale plant, had little trade acceptance and had a product design that was then unacceptable to most customers (Nelson 10,219–20).

334. For three to five years following its acquisition, Heckethorne's market penetration in the replacement shock absorber market remained essentially unchanged (Putman 1114, 1181; Nelson 10,936 *in camera*). According to Questor's Mr. Putman, the company then decided that if it wished to become a significant factor in the replacement shock absorber market, it would have to completely redesign its shock absorbers (Putman 1114–15; Nelson 10,218). Thereafter, Questor did completely engineer a new type shock absorber "from scratch", bought new equipment for its manufacture,

and built up the necessary inventories (Putman 1115; Nelson 10,220). With its new design of shock absorber, Questor was able to promptly increase its penetration in the replacement market, by switching over several of its good nontraditional channel customers (Putman 1115; Teryl 4433; Nelson 10,936 *in camera,* 11,027 *in camera*).

335. Midas, a competitor of Walker in ESP, determined that shock absorbers were a necessary addition to its wholesale ESP line in order to better compete with its competitors, Maremont and Questor. Therefore, Midas entered the replacement shock absorber market as a reboxer (Nelson 9785). Shock absorbers are the only automotive product Midas sells to the wholesale channel, other than ESP (Moore 1220, 1245).

336. In early 1973, Arvin began its efforts to enter shock absorber marketing (Baker 576, 708). Since then, Arvin has been a reboxer, selling shock absorbers purchased from Monroe, but merchandised under an Arvin label (Baker 575, 708; Pond 771, 779–800; Nelson 9786, 9857, 10,210). All of Arvin's sales of shock absorbers have been to customers other than WDs **[76]**(Baker 575–76; Nelson 9874). Some of these sales have been to muffler installation shops (Verner 886–87; Nelson 9857, 9875, 9877–78).

337. Arvin added shock absorbers to its product line because they were "a very natural product for us [Arvin] to add to our line." (Baker 576; *see* Jaffe 2805). Arvin's Mr. Baker believes that shock absorbers "certainly" are compatible with ESP in the replacement market, because of "good freight savings," the availability of combined shipments, sales to the same customers, and use of the same kind of warehousing and advertising (Baker 576, 589). Arvin also added shock absorbers because its leading ESP competitors already offered them, and its customers wanted them (Baker 576; Jaffe 2805).

338. Muffler Dynamics, a replacement ESP producer, made overtures to Blackstone, a replacement shock absorber producer, to establish a joint marketing program for the two firms (Barna 1353–54; Kittridge 1497). Muffler Dynamics also considered offering a line of private label shock absorbers along with its replacement ESP, but rejected the idea because the cost of the requisite inventory was too substantial (Kittridge 1447–48). If it were to add any product line, Muffler Dynamics would wish to add replacement shock absorbers (Kittridge 1449–50).

339. A prime consideration in Walker's decision to purchase Monroe was that its major ESP competitors, Questor and Maremont, were selling both lines to the independent aftermarket (CX 4E, J; CX 5E; CX 7; CX 10B; CX 11; CX 17; CX 20G; *see* Cook 1594–95). Walker

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documents have recognized the advantages that flow to Maremont and Questor from selling both shock absorbers and ESP to the independent aftermarket, stating that a defensive entry into shock absorbers is necessary to decrease the possibility of loss of ESP accounts to firms which offer both shock absorbers and ESP (CX 5E; CX 10A–B; CX 11; CX 17; CX 21E; CX 77). Walker believed that "the ability to sell and distribute a dual line of shocks and exhaust is of real benefit in the mass merchandiser and specialist market, which is the fastest growing segment of the market" (CX 10B). Walker recognized that a major benefit to it from acquiring Monroe is that "we would have one company competing with the other major competition in the market who already supply shocks and exhaust systems" (CX 4J; *see* CX 21E). Walker's president, Mr. Cook, stressed this factor in his presentation to the Tenneco Board in seeking authorization to acquire Monroe (CX 11; CX 20G; CX 21C).

E. Synergistic Savings

340. Prior to the merger, Walker officials envisioned significant cost savings by combining certain operations of Monroe with Walker (CX 4E, G; CX 5C–D; CX 7; Cook 1615–16; Nelson 10,164). These cost savings were quantified by top Walker officials, with the assistance of top Monroe officials, at the insistence of Tenneco's executive vice president, and were **[77]**presented to the Tenneco Board of Directors (CX 21A, F; Cook 1612–13, 1615–16, 1628, 1639–40, 1683; Ashford 11,444–46). In describing these figures to the Tenneco Board, Mr. Cook, then president of Walker, "advised them that the earnings or the potential savings and cost savings may not appear exactly in the accounts as we had forecast or exactly in the time frame that we had forecast, but overall that the totals were still obtainable" (Cook 1640; see Ashford 11,451). Walker foresaw cost savings resulting from combined warehousing, order processing, shipping, manufacturing, purchasing, market research, production engineering and also from combined NAPA and national account field sales forces (CX 5Z–2, Z–22; Cook 1616, 1708; see CX 208Z–33–Z–34, Admission No. 287; Ashford 11,460, 11,466, 11,469, 11,471). Walker expected that savings from these combined operations would be translatable into profits (CX 5Z–2; Cook 1615–16). Walker also anticipated that these synergies would result in increased replacement market penetration for both Walker and Monroe (CX 4G; CX 5Z–13, Z–19–Z–20). Walker recognized that "the combination of Monroe's operations with Walker will undoubtedly be questioned by the FTC. However, we feel the potential profits of this combination are sufficiently worthwhile to pursue this acquisition" (CX 5D).

341. The synergistic savings projected by Walker resulting from combining Monroe and Walker "are attainable and . . . there is potential well beyond that projected" (CX 6B, CX 21A; Cook 1616). By 1980, Walker projected these synergistic savings to be $12,145,000 for cost of goods sold (CX 21F; Cook 1623), $2,075,000 in the marketing area, $1,395,000 in administration, and $1,000,000 in interest expense (CX 20B; Cook 1629). Of the projected $12.1 million in savings of cost of goods sold, $4.6 million represented savings resulting from the transfer of inventory and distribution function from Monroe's plants to the Walker distribution center (Cook 1625–26; Ashford 11,460). At the time of trial, this transfer had been accomplished and the productive capacity of Monroe for shock absorbers was expanded by 10.4 million units annually "without adding any bricks and mortar, or without duplicating a lot of the fixed charge that apply to any manufacturing plant, such as plant management, maintenance, et cetera" (Cook 1625–26; Ashford 11,460).

342. Walker informed Tenneco's Board of Directors that the ability to offer Monroe shock absorbers and Walker ESP under one operation and the shipping of combined loads would within five years improve Walker's penetration of the wholesale segment of the replacement ESP market by 1%, and its penetration of the retail segment of the replacement market by 3% (CX 20H; Cook 1641–42; Nelson 1014). In addition, Walker told the Tenneco Board of Directors that Monroe, over the same time frame, should increase its traditional market share by 2%, and its nontraditional share by 6% (CX 5R; Cook 1631–32, 1641–42; Nelson 10,164). [78]

343. The 2% increase in Monroe's penetration of the traditional market was expected to generate revenues of $3,010,000, and profit before taxes of $630,000; while Monroe's 6% increased penetration of the nontraditional market was estimated to yield 10% in a three to four year period, additional revenues of $10,500,000, and profits before taxes of $1,575,000 (CX 5Z–13).

344. Walker projected that its increased ESP penetration resulting from the combination would yield a 1.6% overall increase in market share, bringing added revenues to Walker of $7,400,000, and profit before taxes of $3,200,000 (CX 5Z–19).

345. Respondent's basic response to this pre-merger evidence has been to denigrate their own planning documents, asserting that the projected savings for the most part did not occur, and that the projections were simply erroneous. Two of their top officials, Mr. Cook and Mr. Ashford, testified to that effect (see RPF 369–91; RRPF 152–54).

XI. Compatibility of Hydraulic Jacks and Shock Absorbers

346. In addition to other skills, the manufacture of shock absorbers also involves a knowledge of hydraulics (CX 4F, CX 5Z–1, CX 15J; Nelson 9887–88; see CX 208Z–26, Nos. 246–247). Walker possesses certain technical knowledge in this area, both fluid and air, by virtue of its position as a major U.S. manufacturer of hydraulic jacks and lifting equipment (CX 5Z–1, CX 15J, CX 21D; CX 58A, CX 208Z–28, Admission No. 261; Uhen 1866, 1912; Nelson 9887; Ashford 11,513). Walker has been manufacturing jacks since 1912, and since 1971 has been manufacturing air and hydraulic jacks at its Jonesboro, Arkansas plant (CX 208Z–28, Admission Nos. 262–263; Uhen 1866; Thompkins 2253). Walker also maintains a jack engineering facility in Racine, Wisconsin (Foster 5139). Prior to the Monroe merger, a Walker document stated that "much of the shock absorber components could be made by Walker's jack and exhaust system manufacturing equipment." (CX 15J) In addition, hydraulic technology is used at Tenneco's J.I. Case and other Tenneco subsidiaries (CX 208Z–26, Admission No. 249).

347. While there are significant differences in the functioning of hydraulic jacks and shock absorbers, both do employ certain similar technology and engineering, and use similar parts made in a similar manner as low-volume shock absorbers (CX 15J; Givens 413–15, 420, 491, 508–09; Uhen 1867–70, 1914–15; DeLisle 4829, 4863). The manufacture of shock absorbers also requires the use of hydraulic oil or fluid, a product also used in hydraulic jacks (Givens 400, 420; Hegel [79]1724; Uhen 1876–77). Walker has the hydraulic oil for its jacks compounded to its specifications (Uhen 1912; *see* Foster 5033). Walker's President, Mr. Cook, outlined the production similarities between jacks and shock absorbers in his presentation to the Tenneco Board when he sought authorization to acquire Monroe (CX 21D).

348. To amplify, the piston rod parts and the intermediate cyclinder head in a MacPherson strut are essentially the same size as those required in a hydraulic jack made by Walker, and the strut contains a seal fashioned in a similar manner to that of a hydraulic jack (Givens 426–27, 430, 436, 508–09; Nelson 9888–89, 9895). Both jacks and shock absorbers contain rubber seals, springs, bearings, tubing, check valves, screw machine parts and machine rods, and chrome plated parts (CP X3A–L; Givens 400–02, 413–15, 420).

349. Walker manufactures a number of items for jack production which are similar to the components of a shock absorber, including the tube or outer reservoir, some ram assemblies (called pistons on

shock absorbers), and stampings and screw machine parts (Givens 413–15, 420; Uhen 1881–82; *see* CX 208Z–30, Nos. 269–70). In the instance of the outer tube, Walker purchases the bulk tubing, made to its specifications, cuts it to length and domes it in a sheet metal press (CX 245G; Uhen 1881–82). Subsequently, Walker finishes the end of the tubing, and taps an oil fill hole in it (CX 245H–J; Uhen 1882–83). Both shock absorber manufacturers and jack producers purchase many common-type items from outside suppliers, including rubber seals, bushings, springs, some screw machine parts, hydraulic oil, and centered components (Givens 400–02, 413–15; Uhen 1867, 1874, 1876). These purchased parts are fabricated to the manufacturer's specifications (Uhen 1906).

350. There are certain similarities in engineering and research and development regarding hydraulic jacks and shock absorbers (CX 15J; Nelson 9893–94). For example, Walker's jack operation employs a research and development unit that seeks out better seals, and other types of materials to use to improve its jacks (Uhen 1891). Walker's jack operation also produces prototypes and tests these in its laboratory (Givens 420; Uhen 1894). A Walker document in evidence states that "Walker jack research and development technology is similar to shock absorber design technology in that both products embody hydraulics and air principles" (CX 15J). Both Walker's air jacks and Monroe's air shocks require combined application of hydraulic and pneumatic principles (CX 5Z–1). The Terramatic principle discussed *supra,* which Walker was considering for shock absorbers, was applicable to other hydraulic products, including jacks (CX 67B; *see* CX 3C).

351. Walker possesses several patents in hydraulic processes and devices (Uhen 1913; CX 40A–V). Technical **[80]**similarity is also reflected in the fact that a Walker document analyzing the propose[d] acquisition of Triple S stated that "our jack engineering department can give technical support to their products" (CX58A).

352. The record shows that some producers of hydraulic shock absorbers also manufacture hydraulic jacks and lifting equipment, namely Armstrong, Bilstein and Fichtel & Sachs (CX 84C; CX 981, K; CX 222A–B; Petzsch 2444; Diggleman 2590; Cox 4373; Nelson 9886–87). Indeed, Bilstein originally began as a jack producer; subsequently it obtained a license and then developed a line of high quality shock absorbers (Petzsch 2442–44, 2446–47; Nelson 9886, 9887, 10,090). Prior to producing shock absorbers, Bilstein made no precision-assembly products (Petzsch 2482–83). There was testimony that Bilstein and Armstrong have produced jacks and shock absorb-

ers in the same plant (Petzsch 2445, 2476; Hooper 2635–36; Nelson 9889).

353. It should also be noted that Walker possesses an affinity for shock absorber production not only due to its manufacture of ESP and jacks, but also due to its production of oil seals (Schultz 1740, 1854; Uhen 187). Mechanex, a Walker division, has supplied seals for use in the production of Walker's hydraulic jacks (Uhen 1875). At least one industry witness was of the belief that a shock absorber manufacturer would benefit from having the knowledge and capability to manufacture oil seals in two ways: (1) control of its supply and cost of seals; and (2) possible development of new shock absorber products (Givens 420–21).

XII. Respondent's Interest in and the Extent of Its Entry into Shock Absorbers Prior to Its Acquisition of Monroe

354. Basically a one product company (ESP), Walker has sought repeatedly to diversify its product line since its acquisition by Tenneco in 1967 (Cook 1585). Walker also sought diversification as a method for increasing its total sales (Cook 1585–86).

355. As previously indicated, shock absorbers were of more than passing interest in regard to Walker's diversification goals. *See generally* Finding 263 *supra.* In addition, Walker's discussions with Armstrong Equipment Ltd.,[103] its negotiations with Tropic Industries[104] and its acquisition of [81]Triple S Industries[105] demonstrate this interest in the consequent steps taken to expand operations into the shock absorber business (Nelson 10,212–14, 11,040–41).

356. The evidence shows that in July 1970, Walker's Financial Planning staff conducted a study which identified those automotive parts most attractive in terms of profitability and growth as possible new products for the company (CX 41C). The study, "Profit and Growth Characteristics of Selected Auto Replacement Parts", was limited to the traditional aftermarket (CX 41A, C). The study concluded that "two product categories seem especially deserving of further market research: front suspension parts, which would include shock absorbers, and filters. These two categories are not only outstanding in terms of apparent profitability, but they have experienced exceptional market growth as well" (CX 41F).

357. For some time prior to the merger, Walker had been requested by Tenneco's Planning Department to identify potential new product lines that would fit most closely with Walker's

[103] Findings 359–64, *infra.*
[104] Findings 365–68, *infra.*
[105] Findings 369–81, *infra.*

distribution and marketing system (CX 3B). Walker's consistent answer was that shock absorbers were the most compatible product with Walker's ESP business (CX 3B).

358. From 1967 on, Walker believed it desirable to enter the U.S. replacement shock absorber market, because it perceived itself to be at a relative disadvantage to its competitors Maremont and Questor, which offered both shock absorbers and ESP.[106] As one Walker official stated:

> [Our] initial reason for wanting to buy a shock absorber line is to broaden our base in the exhaust specialty market. As we discussed, in competing with, particularly, Goerlich [Questor] who can utilize the Columbus Shock Absorber Line . . . we find we are at a disadvantage due to Goerlich's ability to combine the two product lines, exhaust systems and shock absorbers, for freight savings and also the ability to supply specialists both lines from one source, plus the ability to accumulate truck load discount orders more readily.

(CX 77) [82]

A. Armstrong Equipment Ltd.

359. Armstrong Equipment Ltd. ["Armstrong"], a manufacturer of shock absorbers for both the OE installation and replacement markets, has its principal manufacturing facilities in Great Britain, and shock absorber manufacturing subsidiaries in Australia, Canada and South Africa, as well as a marketing organization selling shock absorbers in the United States (CX 81A).

360. During 1966–1968 Walker had inconclusive discussions with Armstrong concerning various arrangements by which Walker could use that company as a vehicle to enter the U.S. replacement shock absorber market (CX 83A). Walker and Armstrong also discussed, *inter alia,* the possibility of Walker marketing shock absorbers manufactured by Armstrong, or of Walker manufacturing shock absorbers in the U.S. under a license from Armstrong (CX 72; CX 73; CX 74; CX 76; CX 77; CX 78; CX 79; CX 208Z–40, Admission Nos. 320–21).

361. Walker considered paying Armstrong a royalty for the use of that company's patents and know how in the manufacture of shock absorbers (CX 74; CX 76; Hooper 2619, 2637–38). However, Walker's interest in and willingness to pay such royalties was limited by profit margin considerations, balanced against the cost to Walker of engineering shock absorbers in-house (CX 75; Hooper 2619).

362. In August 1967, Armstrong proposed to supply shock

[106] *See* Findings 184–207 *supra.*

absorbers to Walker for sale in the U.S. and "as volume increases to assist you [Walker] in setting up manufacturing facilities in the United States" (CX 73; CX 76; CX 208Z–40, Admission No. 322; Hooper 2619).

363. During 1968 these discussions continued. In February 1968, Armstrong's president informed Walker's president that "I am now awaiting your 3 year marketing forecast and am hopeful that we shall be able to quote satisfactorily for your first 3–4 years requirement [for shock absorbers] and then assist you in getting into the manufacturing end of the business" (CX 79; CX 78).

364. In April 1968, Walker informed Armstrong that it had decided to purchase and resell domestic Monroe-made shock absorbers rather than imported Armstrong products (CX 122; *see* Hooper 2620). Thereafter, Walker began to market Monroe-made shock absorbers to muffler shops, using Walker's existing distribution facilities (Teryl 4433–44; Ince 4981, 4985; Nelson 9744).

B. Tropic Industries

365. In 1973, according to record documents, Walker considered acquiring Tropic Industries, a small company which [83]possessed a shock absorber prototype (CX 45B–C; CX 45J; CX 46; CX 47; CX 48). A Walker study analyzing this proposal stated that such an acquisition would enable Walker to compete successfully against the entrenched shock absorber companies, *i.e.,* Maremont and Questor (CX 45N–"O"). The study also examined the possibility of Walker licensing shock absorber technology from Tropic, as well as the possibility of Walker entering into a development contract with an option to purchase Tropic at a later date (CX 45N–"O"). A Walker official, Mr. Fairchild, believed this acquisition to be a "rare opportunity for Walker to enter a new field within the automotive parts industries" (CX 46A).

366. Tropic Industries had a patent on and produced a prototype called a "Loadamatic self adjusting shock absorber" (CX 45A; CX 46A; CX 47; CX 208Z–39, Admission No. 313). The Loadamatic was designed to adjust the level of the car or truck chassis automatically when the size of the vehicle's load was changed (CX 45A–B; CX 46A). It was envisioned that this device would compete directly with the spring or air-adjustable type shock absorbers offered by the major shock absorber manufacturers such as Monroe and Maremont (CX 45A).

367. On March 8, 1973, based upon his evaluation of Tropic Industries, Mr. Fairchild stated:

I am recommending that Walker begin negotiations with Tropic Industries for an option to buy the company and interim rights to guide product development and testing through a loan or equity participation. During the option period, Walker could also proceed with marketing research and other planning to confirm the market and profit potential to its satisfaction. Alternatively, by the time negotiations are in progress we may want to buy the product rights or the company outright.

(CX 46B)

In Mr. Fairchild's estimation, "an initial investment of $2.5 million to buy rights and start up production and marketing will generate $10 million in sales within five years and return nearly 35% on the investment" (CX 46A).

368. Following further discussions, and subsequent search of shock absorber patents, it was concluded that Tropic's Loadamatic had an insufficient degree of patent protection (CX 48; CX 49). On the basis of this, Walker's interest in Tropic Industries terminated (CX 48B; CX 49).

C. Triple S Industries

369. In early 1974 Walker and Triple S Industries [84]["Triple S"], whose products included steering dampers,[107] began correspondence regarding licensing arrangements or the possible acquisition of Triple S by Walker (CX 52A–D; CX 51; CX 53A–B; CX 54A–C).

370. Walker was particularly interested in the design Triple S had developed for its "Terramatic" shock absorber[108] (CX 51H; CX 52A–D; CX 54A–C; CX 63C; CX 69I–J).

371. The Terramatic shock absorber was seen as offering certain advantages over existing shock absorbers, because the product was designed to permit the consolidation of part numbers for replacement shock absorbers; to have variable automatic compensation for differing driving conditions; and to require half the number of parts of existing shock absorbers, making it easier and less expensive to manufacture (CX 69I–K). Mr. David B. Prescott, the same Walker official who had conducted a technical analysis of Tropic's Loadamatic,[109] declared in favor of the acquisition of Triple S (at the right price),[110] notwithstanding some misgivings concerning [85]the value

[107] Among Triple S' steering damper customers were NAPA, other WDs and Montgomery Ward (CX 51D; CX 55A; CX 62B; CX 69N). Triple S also sold a steering damper unit to Ford for OE and OE service use on truck and bus chassis (Kody 9325–26).

[108] *See* Finding 371, *infra.*

[109] CX 49.

[110]

Terramatic. This is the original item which caused our interest in the company—and is the one farthest out in the time frame. Patent has been applied for and a "couple of its features" have been tried in a Steerline unit. In my opinion, the features of this unit are technically sound—with one misgiving. Leakage path flows will become percentage of the flow through his control configuration—I do not know what percentage. Success

(Continued)

of the Terramatic patent.[111]

372. Although a testing prototype of the Terramatic shock absorber had not been produced as of July 1974,[112] Walker documents in the record reflect some confidence that the Terramatic principle would prove adaptable to both regular and heavy duty shock absorbers, as well as to steering stabilizers—Triple S' principal product line (CX 51D; CX 53A–B; CX 54B; CX 69D).

373. As of 1974, Triple S controlled the production of the damping unit in its steering dampers by requiring the manufacturer, Maremont, to produce the unit in accordance with Triple S engineering specifications (CX 54A; CX 280; CX 282A–C; CX 283A–C; CX 284A–B; CX 292A–D). Triple S "gave us [Maremont] nearly all the design parameters[113] that normally are involved **[86]**on a shock absorber" (Kody 9309, 9315; CX 280; CX 281A–B; CX 282A–C; CX 283A–C; CX 284A–B).

374. A marketing analysis of Triple S' products[114] conducted by Mechanex (a Walker subsidiary)[115] calculated a market potential for replacement steering dampers applicable to passenger cars of $21.4 million and a market potential for replacement steering dampers applicable to heavy-duty vehicles of $3.4 million (CX 56C). This analysis recommended that Walker's sales force be used to sell Triple S steering dampers to both the OE market and replacement market (CX 56C). The analysis estimated Triple S' share of sales of replacement steering dampers to all customers to be 50% of the market (CX 56C). The analysis concluded that "the greatest potential, of course, which is not included in these projections, is the Terramatic principle as applied to shock absorbers" (CX 56A).

375. One of the reasons cited to Walker's President, in support of

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depends on that percentage, and the selected manufacturing process would largely determine it. No complete prototype has been built.

I am enthusiastic as to the possibilities of this product, first in Steerline (particularly heavy duty) and later some manufacturing experience, very probably for heavy duty shock absorbers—and even automobile shock absorbers. I emphasize that this is not production ready. Dollars and time must be invested in development. I do feel there is a reasonable chance of success

When this success is achieved, there is good opportunity (as Harry [Petrak] claims) for consolidation of slow movers into faster movers. There would then be definite marketing advantages as well as the technical (control) advantages he claims in his report.

(CX 54B)

[111] While CX 53A–B, dated February 15, 1974, expresses some reservations about the Terramatic patent, Mr. Prescott's overall support for the acquisition was expressed in a letter dated May 15, 1974 which is CX 54A–B. Ultimately, these reservations were borne out by an investigation of the patent, and expressed by Mr. Shaff in a July 15, 1974 memorandum to Mr. Tom Cook which is RX 7 (*See* RX 8; RX 11).

[112] (CX 63A; CX 67C).

[113] These design parameters covered such technical matters as "valving or the resistant values in both the compression and extension direction; the stroke; the length; the mountings; the bore size; the outside diameter; the type of fluid; the paint; the type of marking" (Kody 9309). Maremont supplied Triple S with a take-apart shock absorber to assist it in the design of the valving (Kody 9318). Triple S directed Maremont's Gabriel to make improvements in resistance values and internal construction of the shock absorber unit (Kody 9316, 9354).

[114] As of July 2, 1974.

[115] *See* Finding 5, *supra*.

the Triple S acquisition, was to obtain Mr. Harry Petrak, the President of Triple S, for the Walker "team" (CX 58B; CX 64A). Mr. Petrak, who did not possess an engineering degree (Prescott 11, 310–11), was described variously as "a good salesman rather than a technical man," and "an individual talented in hydraulics and other skills that could be utilized by Walker." After the Triple S acquisition he became a Tenneco employee, and remained one at the time of trial (CX 58B; CX 64A; Hegel 2103–04; Kody 9299; 9319–21; 9350; 9354–55).

376. Following a July 1974 analysis of Triple S prepared by Walker's Mr. A. E. Robinson, it was reported to top management that:

I would definitely recommend we make a purchase offer for Triple S Industries. The present products [steering stabilizers] are competitive in the market place, the new products (Autolok and Terramatic) represent promising but unknown quantities, and should [87]be considered as frosting on the cake if they live up to their potential. In this regard, I have attached a directive from the DOT which was just issued and outlines their program for testing of heavy duty vehicles for front end stability. This has to be construed as a major plus for the use of steering stabilizers.

Estimating product profitability is hazardous because of the tremendous growth we would expect from the Triple S products. However, because they are well engineered, have been accepted by the marketplace where marketed, and are designed to meet a definite and growing need of vehicle manufacturers, I would expect to achieve significantly better than average profitability. ***

(CX 62E)

377. In August 1974, a further review of Triple S by Mr. Robinson forecast other benefits to Walker in obtaining Triple S, including an increased demand for tubing (CX 64B *see* CX 51D). Another potential benefit would be an "initial step in product diversification to reduce dependency on exhaust systems as outlined in [Walker's] five year presentation to Tenneco" (CX 64B; *see* CX 51B–C). An earlier report by Walker's Mr. Prescott identified the immediate benefits to Walker flowing from Triple S' current, as well as future, products (CX 54C).

378. In its formal proposal to Tenneco requesting authorization to acquire Triple S, Walker stated that "[s]ales and earnings have been outstanding but the vulnerability associated with heavy reliance on a single product line has been recognized by management and an acquisition program undertaken to expand product lines and reduce our vulnerability" (CX 51B–C). The proposal continued:

Triple S fits well with the goals desired by Walker in its acquisition efforts. Its products are well received in the marketplace, are in markets that have excellent

growth potential, and can be highly profitable with adequate working capital and management support. Triple S has many of the same customers as Walker in the automotive marketplace with the potential of adding major customers in both aftermarket and original equipment markets with working capital and management strength the sole deterrents. Future products could provide Walker with a toehold in the vast shock [88]absorber market both domestic and international.[116]

(CX 51C) Mr. Robinson's analysis describes the prospects of Triple S regarding shock absorber sales and profit potential as "outstanding" (CX 51B).

379. On October 15, 1974 Walker acquired Triple S, its steering damper business, and the rights to the use of the Terramatic principle (Complaint and Answer ¶44; CX 57A–J; CX 58B; CX 66A–B; Nelson 9744–46; Prescott 11,291–92; Ashford 11,492–93).

380. According to the acquisition agreement, the patent rights to the Terramatic and to another device, the Autolok,[117] would revert to Triple S in the event that Walker failed to take affirmative action in regard to using them in producing a product within a period of four years from the effective date of the agreement. Although Walker acquired Monroe before having actually produced a Terramatic shock absorber, as late as August 12, 1976, Mr. Cook, Walker's president, expressed concern that Walker's Triple S patent rights be preserved (CX 70).

381. At the time of its acquisition, Triple S possessed machining, warehousing and packaging facilities (Kody 9298). While Triple S did not have the physical facilities to actually manufacture shock absorbers, the cylinder of its steering dampers being supplied by Maremont, it did manufacture the brackets or attaching parts (Kody 9298–99, 9351).

382. According to witness Tompkins, one of respondent's experts in automotive manufacture, the role of a manufacturer is generally to design, engineer and develop a product, to make and assemble it, and to sell it (Tompkins 2302). Triple S, later Mechanex, performed some of [89]the functions of a manufacturer in that it designed its steering dampers, supplied specifications for the damper unit, modified some of the damper units received from Maremont before sale, designed and manufactured some of the attaching components, packaged and labelled the steering dampers and sold them in competition with other manufacturers to WDs, mass merchants and an OE account (the OE account was for busses and truck chassis) (CX

[116] The Terramatic device was described as "the product with the greatest risk and development time required and also the greatest potential. At the very least it could be the unit we would manufacture for the Steerline and Trailiner devices and at the most it would provide the possible entrance into the billion dollar shock market" (CX 51G).

[117] The Autolok was a patented automatic version of Easylok, which permits free wheeling for the front drive of four wheel drive vehicles (CX 51E, G).

54A; CX 69G; CX 280; CX 281A–B; CX 282A–C; CX 283A–C; CX 284A–B; RX 635A–B; RX 636A–B; RX 637A–B; RX 638A–B; RX 639A–B; Schultz 1746, 1831–32; Kody 9298–99, 9309, 9314–16, 9318, 9325–26, 9351, 9354; Prescott 11,284–86, 11,290, 11,195–96, 11,329).

383. Triple S, later Mechanex, held itself out to the trade and to the public as a manufacturer (CX 43A–G; CX 44; CX 51L; CX 339A–B; CPX 15; CPX 16H). Triple S advertisements to the replacement market represented that the company's steering stabilizer was "manufactured by Triple S Industries" and that the company had "been in the business of developing and manufacturing hydraulic steering stabilizers for over 20 years" (CX 43B; CX 339A–B). Later, Mechanex advertisements stated that the company offered steering stabilizers "developed for all types and sizes of vehicles, from small cars to largest trucks" (CX 43B–C, G).

384. There was evidence that companies such as Ford, International Harvester, AMC, Moog and Cofap regarded Triple S as a steering damper manufacturer (CX 51G; CX 62D; CX 173A; Nelson 9764–67, 10,165–66, 11,048–50).

385. The November 1976 Walker proposals to acquire Monroe regarded steering dampers as an expanding portion of the shock absorber business, particularly due to their use on recreational four wheel drive vehicles (*see* Kody 9333–34). Walker felt that its steering damper "was a product with significant growth potential. Walker has certain patents in this area and the embryo of an organization to launch this product. Because of its product components (shock absorber cylinders) and the market served, steering stabilizers are a natural fit with shock absorbers" (CX 5Z–3).

386. Shortly before the proposed acquisition of Monroe, Walker documents indicated an intention to use the Terramatic design concept in the manufacture of steering dampers.[118] Plans to expand the use of the Terramatic **[90]**principle to other types of shock absorbers were set forth in Walker's 1977–81 Five-Year Plan.[119]

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[118] In a "Proposal to Acquire Monroe Auto Equipment Co.," it was stated that "we also hold patents through our acquisition of Triple S Industries of some advanced shock absorption principles which we presently plan to use in our steering stabilizer" (CX 4F).

[119]

> During 1976, we will be working on a new concept in shock absorption called Terramatic. The Terramatic unit, which is patented, came to Mechanex through the purchase of Triple S Industries in 1974. If the Terramatic principle proves successful it could be extended to automotive and heavy duty shock absorbers, opening up a tremendous new market for Mechanex. However, this plan does not reflect any sales of Terramatic because of development and testing still to be done.

(CX 25Z–9; *see* CX 3C; Kody 9318)

Respondent presented testimony that Triple S was not acquired for its Terramatic shock absorber design alone (Cook 1676–77). And, in the opinion of the witness Hegel, the Terramatic shock absorber could not be manufactured at an efficient cost (Hegel 2088–90). Walker paid $150,000 for Triple S, nothing for the patent, which was described before the acquisition by Walker's staff as "very narrow and has very little chance of having a major effect in the industry" (Cook 1676–77; RX 7). Walker's patent attorney Thomas Torphy concluded "there is not

(Continued)

387. Walker predicted that the Triple S acquisition would provide Walker with a significant entry vehicle into the replacement shock absorber market through sales of steering dampers. Walker's identical projections of July 15, 1974 and July 24, 1974 forecast that replacement steering damper sales would start at $4.6 million in the year following acquisition and increase to $31.4 million in the fifth year following acquisition, with most of the sales to the automotive aftermarket (CX 59B; CX 62B, E). Walker's calculations predicted that the Steerline steering damper would have a market penetration of 15% in the first post-acquisition year, which would increase to a figure of 27% for the fifth post-acquisition year (CX 59A). These predictions applied only to steering dampers (CX 59A). The sales potential for Terramatic was described as "huge" (CX 59A). However, there were no actual predictions of sales volume made for the Terramatic (CX 59A). **[91]**

388. Walker expressed an interest in a significant expansion into the replacement shock absorber market both before and after its acquisition of Triple S.[120] Mr. Cook, then Walker's president had followed the business history of Monroe for several years despite his knowledge that the company was not for sale (Cook 1575–76, 1580). In Mr. Cook's opinion, during the period immediately preceding 1976, Monroe had a "seemingly lack of concern for the customers' wants and desires" (Cook 1581, 1593–94). Mr. Cook also felt that Monroe's policies and pricing practices invited competition (CX 4; Cook 1593–94). Discussion between Walker and Monroe spanned several years prior to the acquisition (CX 4C; CX 5D).

XIII. Availability of Toehold Acquisitions

389. As noted in Finding 184, *supra,* a number of foreign manufacturers were engaged in the sale of shock absorbers in the U.S. replacement market in 1976.

390. In September 1975, an examination of the Western European shock absorber market was conducted for Walker Europe. The study reported the size of the market in each country as well as the ownership of each manufacturer. Among the firms studied were those which sold shock absorbers in the U.S. replacement market (CX 98A–K; CX 187B).

A. Armstrong

much patentable subject matter in the subject application [Terramatic] and that any patent which might issue could not prevent competition from producing a shock absorber having identical functions" (RX 8).

[120] *See generally,* Findings 354–58, *supra*).

391. The British Company Armstrong,[121] one of the leading European manufacturers of shock absorbers, produced a full line of replacement shocks for the United Kingdom and had plants in Great Britain, Australia, South Africa and Canada (CX 84C, E; CX 97E; CX 208Z–6–7; Admission Nos. 141, 143; Moore 1250; Diggelman 2530–31, 2589; Hooper 2613, 2615). In addition to its manufacturing plants, Armstrong also had licensing arrangements in several countries (Diggelman 2585; Hooper 2628). In the United States, Armstrong marketed shock absorbers from its warehousing facility in Chicago, Illinois (Hooper 2613–14). **[92]**

392. Armstrong possessed the technological expertise and proficiency to engineer and design shock absorbers (Moore 1250–52; Hooper 2613, 2618; *see* CX 208Z–6, Admission No. 142). At the time of the hearings, its shock absorber line included the following types: double tube, single tube, spring assisted, MacPherson struts and cartridges, steering dampers and a special lever type shock absorber used on a few British cars (Diggelman 2587, 2590, 2603; Hooper 2613, 2615; Freeman 8856 *in camera*).

393. In 1974, Armstrong had plans to expand shock absorber production in its (now closed) Canadian plant, in part to reduce the dependence of Armstrong's Canadian sales operation on shock absorbers made in the United Kingdom, and in part to serve as a better source of supply for its United States distribution facility (CX 84E). Walker estimated Armstrong's replacement shock absorber sales for 1974 to be approximately one million British pounds or $2.2 million (CX 84F).

394. A May 1974 analysis of Armstrong by Walker's investment banker in London recommended the firm's acquisition by Walker (*See* CX 82; CX 84). In July 1974 Walker Europe's President, Mr. Padget, reported to Walker that he had heard that "circumstances could be ripe for a takeover" of Armstrong (CX 80).

395. Walker was informed that an acquisition of Armstrong would reduce Walker Europe's reliance on a one product base and also provide a means for Walker's entry into the U.S. shock absorber market (CX 81B; CX 208Z–43, Admission No. 335). Additionally, Walker would be enabled to sell ESP through Armstrong's European channels of distribution, while Armstrong could sell shock absorbers through Walker's U.S. and foreign channels (CX 83B). Mr. Padget of Walker Europe also reported that it might be possible for Walker to make shock absorbers in Walker factories and close Armstrong's Canadian assembly operations (CX 208Z–44, Admission No. 341).

[121] Armstrong is a publicly held corporation whose stock is traded on the London Stock Exchange (CX 208Z–6, Admission No. 140).

396. Mr. Padget met at least twice with Armstrong's Chairman of the Board, Mr. Hooper, who indicated lack of interest on Armstrong's part (CX 208Z–43, Admission 336; Hooper 2622–23).

397. Mr. Padget relayed this intelligence to Walker also communicating his feeling that Armstrong "might respond to a specific offer," especially if it were sufficiently above **[93]**Armstrong's quotation on the London Stock Exchange[122] (CX 83A; CX 208Z–43, Admission No. 338).

398. On October 14, 1974, Walker's President, Mr. Cook, instructed Walker Europe to maintain its "contact and relationship" with Armstrong, but pending instructions from Tenneco, to take no further action. Mr. Cook further suggested that Walker Europe include the possible acquisition of Armstrong in its five year plan, and to explain fully why such an acquisition made sense (CX 85).

399. In 1976 Armstrong supplied OE shock absorbers for foreign-made vehicles sold in the U.S. (CX 208Z–7, Admission No. 144). It also offered a broad line of replacement shock absorbers for these cars in the U.S. market (CX 84B; Givens 467; Fleuelling 3980; *see* Diggelman 2526). In 1976 Armstrong was the leading foreign shock absorber producer selling in the United States with sales of over 400,000 units (RX 550A *in camera*).

400. Walker Europe continued to maintain its interest in Armstrong through 1976 (CX 87A; CX 88).

B. DeCarbon

401. The DeCarbon Shock Absorber Company ["DeCarbon"] is one of two significant shock absorber manufacturers in France, the other company being Allinquant (CX 97C; CX 98A; Bellot 2882–84; *see also* Diggelman 2567).

402. DeCarbon shock absorbers are of a unique, patent-protected, single-tube design which employs oil and nitrogen gas. They can be produced in several hundred different models and applications, but most sales are for approximately 40 models (CX 92C; Bellot 2885; Stewart 9240).[123]

403. Gas pressurized shock absorbers, such as the DeCarbon models, are considered to be of a superior, refined design. There is some replacement market demand for this type of shock absorber in the U.S. (Bellot 2884–85; Petzsch 2467). **[94]**

404. As of 1976, DeCarbon's production capacity was approxi-

[122] The report contained calculations based on several different prices, all well above current market value, which might be offered for Armstrong's stock (CX 83D).

[123] DeCarbon supplies OE shocks for Renault, Porsche, Mercedes-Benz, Jaguar and some Japanese made cars (CX 92D, E; Bellott 2882, 2884, 2919; Stewart 9240). In Europe, approximately 15% of all vehicles sold use gas pressurized shock absorbers (Diggelman 2509).

mately 3 million units (Bellot 2883, 2919). Its French facilities manufactured approximately 12,000 shock absorbers per day, of which 50% were purchased by Renault to meet about 15–18% of that firm's requirements (CX 92C; Bellot 2844, 2919). Thus, the majority of DeCarbon's sales are in France (Diggelman 2563, 2580–81; Stewart 9241).

405. DeCarbon licenses the technology necessary to manufacture its shock absorbers in 12 countries (CX 92E; Diggelman 2585–86; Bekin 2846, 2864; Bellot 2920–21; Stewart 9265; *see* CX 208Z–8, Admission No. 151). Monroe recently has become a DeCarbon licensee (Bellot 2920–21).

406. In March 1976, a broker, Mr. Gibbons, brought DeCarbon to Walker's attention as a possible acquisition candidate (CX 89; CX 90; CX 92A–B). Thereafter, Walker authorized Walker Europe to pursue the acquisition of DeCarbon (CX 90; CX 91). The broker was authorized to inform DeCarbon that Tenneco has "a five year growth plan which would easily permit, and very quickly, purchase of DeCarbon Shock Absorber Company, *providing* the asking price was justified by its recent net profit after taxes, plus future probable tax profits" (CX 93A).

407. The record shows that while broker Gibbons and DeCarbon had some preliminary discussion, the matter of price blocked a possible acquisition from the outset (CX 95B).

408. In November 1976, Walker Europe wrote the broker, acknowledging the impasse, and requesting that he stay in contact with the situation (CX 96).

409. At the trial, there was testimony given by Mr. Marcel Bellot, a former chief purchasing agent for Renault, that the French Ministry of Industry had certain control over the acquisition of French firms by foreign companies. Further, he testified that in two instances in 1972 and 1973 where American companies, ITT and Federal Mogul, sought to acquire Alliquant, the French government refused to permit this (Bellot 2885–2890).

C. Blackstone

410. Blackstone is a small[124] privately owned shock absorber manufacturer whose products are distributed throughout **[95]**the U.S., primarily to chain stores (Moore 1270; Barna 1343–44, 1369–70; Fleuelling 3918, 4124). In 1976 Blackstone produced a standard 1″ size shock absorber and a heavy duty 1–$^{3}/_{16}$″ size shock absorber

[124] In 1972, with its facility operating to capacity, running one shift, Blackstone produced approximately 800,000 shock absorbers (Barna 1389 *in camera*). Mr. Barna testified in 1978 that with two shifts Blackstone could probably produce 2.5 million units annually (Barna 1344).

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(Barna 1338). While Blackstone has not produced either air-assisted or spring-assisted shocks, its president testified that they had the technical knowledge to do so, and had, in fact, built prototypes (Barna 1338–39, 1341).

411. Blackstone, which entered the shock absorber business by acquiring the equipment of a defunct producer,[125] has been for sale since 1974 (Moore 1256–57 *in camera;* Barna 1336–37, 1351–52 *in camera,* 1373 *in camera,* 1394 *in camera;* Nelson 10,177, 10,188–89). Blackstone has actively sought buyers[126] for this business, which offers manufacturing equipment,[127] specifications technology,[128] raw material and finished goods inventory for $2 million or less (Moore 1256–57 *in camera;* Barna 1351–52 *in camera,* 1355 *in camera*).

412. Blackstone's market share has been declining since at least 1974, and it does not enjoy brand name recognition, or a particularly good name in the replacement market (Barna 1346–49); Borick 4725–31; Nelson 10,952–53). In addition, there was testimony that Blackstone's equipment was outdated and poorly maintained (Putman 1173). **[96]**

413. The record does not support the proposition that Blackstone would be a viable toehold acquisition for Walker's entry into the U.S. shock absorber replacement market (*See* N. Wright 7204–05, 7213–18 *in camera*).

D. Other Firms

414. Allinquant, a family-owned corporation, and the leading supplier of shock absorbers to Renault (Diggelman 2603; Bellot 2882, 2901, 2919; *see* Stewart 9241; Buck 9393), manufactures both gas pressurized and standard dual tube shock absorbers, and has also developed prototypes of MacPherson struts (Diggelman 2512; Bellot 2885, 2904; Stewart 9241).

415. There was testimony that in 1972 the father of the family which owned Alliquant wished to sell the firm (Bellot 2901, 2905–06). However, as noted in Finding 409, *supra,* two acquisition attempts by non-French companies were thwarted by the French government.

416. Fichtel & Sachs, a German firm 75% owned by two or three

[125] Blackstone acquired its shock absorber machinery from Houdaille in 1958, and moved the equipment to its Chicago plant (Barna 1337, 1389).

[126] Blackstone believed that the most likely purchaser of its shock absorber operation would be an ESP producer (Barna 1353). Thus, all but one of the buyers approached by Blackstone were replacement ESP producers (Moore 1257 *in camera;* Barna 1355 *in camera,* 1373–75 *in camera*).

[127] The equipment was described as old and poorly maintained (Putman 1173; Borick 4734; Bracken 4298–99 *in camera*).

[128] The technology would include that for Blackstone's conventional shocks and presumably the prototypes for its air-assisted and spring-assisted designs (Barna 1336–42).

members of the Sachs family, is the second or third largest shock absorber manufacturer in Europe (Diggelman 2557–58, 2589, 2591; Stewart 9246). Fichtel & Sachs produces conventional shock absorbers, gas pressurized shock absorbers, spring assisted shock absorbers, steering dampers and MacPherson struts and cartridges (Diggelman 2555, 2587; Cox 4408; Freeman 8856 *in camera*). It is a major supplier of shock absorbers to the German automotive industry, including Volkswagen, Mercedes-Benz, BMW and Ford of Germany, and a major supplier of replacement shock absorbers in West Germany (CX 97D, H; CX 98A, D, J–K; CX 208Z–9, Admission Nos. 155–156; Petzsch 2470 *in camera;* Diggelman 2556–57; Fleuelling 3980). It supplies shock absorbers to the U.S. replacement market through the car dealer channel of Volkswagen and others.

417. In 1975 or early 1976, the Sachs family agreed to sell their 75% holdings in Fichtel & Sachs to GKN, a British company (Diggelman 2582–83; Stewart 9247). This action resulted in an antitrust suit in Germany which blocked the sale (Diggelman 2582–83, 2608–09; Stewart 9247–48).

418. The record contains no plans by Fichtel & Sachs to manufacture shock absorbers in the United States, nor does the company make direct sales of shock absorbers in the U.S. (Diggelman 2555, 2587, 2596, 2604; Cox 4408; Fleuelling 5796–97; Freeman 8856 *in camera*; Nelson 9937–38, 10,417).

419. Boge, which is 100% owned by the Boge family, is the leading German manufacturer of replacement shock absorbers, with licensees in Brazil and Mexico (CX 97D, H; CX 98A, D, I–J; **[97]**CX 208Z–10, Admission No. 159; Diggelman 2585, 2589; Bekin 2846, 2863; Stewart 9236–37, 9276). In 1976 Boge supplied replacement shock absorbers direct to the U.S. replacement market and was also a major supplier of OE shock absorbers, including MacPherson struts and steering dampers, to Volkswagen, Ford of Germany, BMW, Fiat and Renault (Bellot 2882; Diggelman 2587, 2590; Cox 4408; Freeman 8856 *in camera*; Stewart 9243, 9253; *see* CX 208Z–10, Admission No. 160; Fleuelling 3980).

420. The record reveals no plans by Boge to enter the manufacture of shock absorbers in the United States (Diggelman 2596, 2604; Fleuelling 5796; Nelson 10,418). Indeed, in the opinion of a knowledgeable Maremont official, Boge lacks "the financial strength to build a unit in the United States" (Stewart 9276).

421. August Bilstein KG is a wholly privately owned German manufacturer of high quality pressurized shock absorbers originally produced under a license from DeCarbon (CX 97D, H; CX 98D, I; CX 208Z–10, Admission No. 162; Petzsch 2442, 2454 *in camera*; Diggel-

man 2512, 2531; Stewart 9244; Nelson 10,140, 10,847). Bilstein is a significant OE supplier of shock absorbers in Europe for such firms as Mercedes-Benz, as well as a line of high quality, high performance replacement shock absorbers, including steering dampers and MacPherson struts, for almost all European cars as well as many American and Japanese made cars (Petzsch 2446–47, 2452–53, 2470 *in camera*; Fleuelling 3980; Stewart 9244–46). Bilstein sold a limited number of replacement shock absorbers in the U.S. in 1975 and 1976 through a distributing subsidiary (Petzsch 2445, 2452; Diggelman 2582; Stewart 9253).

422. The record reveals no plans by Bilstein to enter the manufacture of shock absorbers in the United States (Fleuelling 5796; Nelson 9937–38, 10,417).

423. A division of Jonas Woodhead & Sons, Ltd.[129] ["Woodhead"] manufactures shock absorbers in the United Kingdom (Cox 4375–77). The shock absorber plant operated by Woodhead is not fully automated and does not have a tube mill (Cox 4401). The product line of Woodhead consists of applications for a major portion of European and certain Japanese vehicles, including struts, steering dampers and conventional shock absorbers. These were sold to all OE producers in the United Kingdom, and were also sold for U.K. replacement use [98](Diggelman 2563–64, 2590; Cox 4376, 4404–05). Outside the United Kingdom, Woodhead's shock absorber sales are primarily made in Europe, although, according to testimony, "a little bit" was sold for U.S. replacement use (Cox 4376, 4402; Stewart 9253). Woodhead had only a limited line of shock absorbers applicable to cars sold in the United States (Cox 4379, 4384, 4403). Furthermore, Woodhead's former chief executive testified that the firm, was "not a large enough company" to promote the sale of its own branded shock absorbers in the United States (Cox 4379).

424. In 1976, Woodhead's total shock absorber sales were $12.4 million and its total sales were $56.6 million. Thus, Woodhead lacks the financial strength to build a plant in the United States (Stewart 9276). Woodhead had never considered nor intended to set up a shock absorber plant in the United States or to acquire a small U.S. shock absorber producer (Cox 4401, 4403; Nelson 9937–38, 10,417; *see* Diggelman 2604). Furthermore, Woodhead had no intention to have a "major launch of the Woodhead brand" in the United States (Cox 4419).

425. The only foreign shock absorber producer who has built a

[129] Woodhead is a widely-held company whose stock is publicly traded on the London Stock Exchange (Diggelman 2603; Cox 4411; Nelson 10,179).

manufacturing facility in the United States is ITT (Stewart 9274). ITT owns two foreign shock absorber producers, Koni[130] and Wayassauto[131] (Freeman 8833; Nelson 9677). Based upon the technology of Wayassauto and ITT's extensive domestic marketing ability in the OE market, ITT has secured a contract for the production of struts for Ford's domestic operations (Freeman 8838, 8850–51, 8853 *in camera,* 8869–71, 8874, 8884; Nelson 9829, 10,869–70 *in camera*). Such struts are to be built at a new plant erected solely for such production in Macon, Georgia (Freeman 8894 *in camera*). The Ford struts to be built at Macon and any others produced there are to be solely for OE sale. (Freeman 8885 *in camera,* 8897; Nelson 9677).

426. The record does not disclose any other foreign shock absorber producer, other than ITT, which has any interest **[99]**in establishing a plant in the United States or in acquiring a toehold producer in this country (Nelson 9937–38, 10,417).

427. Shock absorbers are an easily imported item which are readily containerized for low cost ocean transport (CX 208Z–46, Admission No. 357). Ocean freight, insurance costs and tariffs are small factors in the cost of importing shock absorbers (CX 208Z–46–Z–47, Admission Nos. 358–359; Fleuelling 3984). Currently, the U.S. tariff for imported shock absorbers is approximately 4–½% *ad valorum* (CX 208Z–47, Admission No. 360; Fleuelling 3983–84). Foreign manufactured shock absorbers are currently sold in the U.S. (*See* RX 550A *in camera*). In the period 1968–1976, imports accounted for approximately 4% of the U.S. replacement shock absorber market (Fleuelling 4111; Nelson 9928; *see* Stewart 9253–54).

XIV. Other Possible Entrants in the Shock Absorber Market

428. Midas examined the possibility of manufacturing shock absorbers before Tenneco acquired Monroe (Moore 1288; Nelson 10,089, 10,998). Midas and the management of its parent, Illinois Central Industries ["IC Industries"], surveyed the manufacturing capabilities of IC Industries including Abex, which produced brake linings (Moore 1285–86, 1288; Nelson 10,090). Midas felt that it possessed the requisite ability to produce the tubing components of a shock absorber, as an extension of the company's ESP production

[130] Koni, a Japanese company, is a manufacturer of specialty, high performance shock absorbers sold in limited quantities for racing and similar special non-OE applications in the United States (Freeman 8834–35, 8878; Stewart 9242, 9253; Nelson 9677–78, 9940, 10,140). Koni has recently opened a facility at Culpepper, Virginia to produce its specialty shock absorbers (Freeman 8837; Nelson 10,880–81 *in camera*). This facility engages in only limited processing and "is not a major manufacturing facility" (Freeman 8881).

[131] Wayassauto, located in Italy, is primarily an OE supplier of shock absorbers, including struts (Freeman 8833–34).

(Moore 1289; Nelson 10,089). However, neither Midas nor Abex possessed the ability to produce rods, nor did they have the necessary design and engineering personnel (Moore 1289). After some consideration, Midas decided against such an expansion "because we felt that before we departed into a secondary manufacturing effort, that we ought to become more expertise [sic] in our primary effort" (Moore 1289). Midas has plans to review entry into the manufacture of replacement shock absorbers from time to time (Moore 1256 *in camera*).

429. After Midas discovered that Blackstone's shock absorber business was for sale, Midas sent four officials "over to Blackstone to see whether or not it would be to our [Midas'] advantage to consider its purchase" (Moore 1257 *in camera*). Later, Midas' President, its Director of Operations for the Automotive Group, along with the President of IC Industries, visited Blackstone to consider the purchase of its shock absorber business (Moore 1257 *in camera*, 1265–68 *in camera*).

430. As of 1976, Arvin considered itself far behind Walker in customer acceptance and merchandising skill (Baker 578; Pond 864–65; Nelson 10,088). Likewise, Arvin was less able or willing to provide financial assistance to its muffler installation shop customers to promote their expansion (Verner 909–10; Nedell 940–41, 974). In fact, Arvin has stopped providing real estate assistance to its muffler installation **[100]**shop customers (Verner 910). Arvin did reject *de novo* entry in 1973, but, according to its chief official, if its program of selling shock absorbers had been as successful as anticipated, Arvin would have by now reconsidered *de novo* entry into shock absorber production (Baker 710–11, 728; Nelson 10,099).

431. Complaint counsel's economist, Dr. Nelson, who is also accepted as an automotive expert, testified that brake parts manufacturers are not considered as likely entrants into the domestic manufacture and sale of replacement shock absorbers (Nelson 9661, 10,105–10, 10,929–31). This statement is supported by the following: Maremont sold its brake friction material business; IC Industries made a decision not to combine Midas and Abex; DBA's[132] lack of success in handling shock absorbers along with its brake line; and the lack of interest and incentive for Bendix, one of the leading manufacturers of brake parts to enter the manufacture of shock absorbers (RX 187Q; Stewart 9270; Nelson 10,105–07, 10,603, 10,929–31).

432. Bendix is a major domestic manufacturer of braking compo-

[132] DBA is a French subsidiary of Bendix (Joines 9111–12; Nelson 10,105).

nents, including hydraulic components, power steering units, universal joints, electronic fuel injection systems, oil filters and spark plugs (Joines 9100, 9102, 9142). Bendix has entered into the domestic sale of antiskid braking systems, electronic fuel injection systems and wiper blades on a *de novo* basis (Joines 9103–04). Outside the United States, Bendix has extensive foreign automotive parts operations producing primarily brake components (Joines 9109–11). Two of Bendix's foreign operations involve shock absorbers, DBA, and LIPMESA. In 1973 Bendiberica, Bendix's Spanish subsidiary, acquired LIPMESA,[133] a Spanish company whose only product was shock absorbers (Joines 9112–14, 9164). LIPMESA and Bendix have no plans to enter the manufacture and/or sale of shock absorbers in the United States (Joines 9119, 9122, 9133; Nelson 10,104). Bendix considered importing LIPMESA shock absorbers into the United States, but did not feel it could be successful in such an effort, in part, because Bendix considers shock absorbers as "a separate product line from our current product lines" (Joines 9137, 9139, 9169–70, 9193; Nelson 11,036–37).

433. Bendix has never sold shock absorbers in the United States, either as a reboxer or as an installer [**101**](Joines 9148). A major consideration at Bendix, in determining whether it can successfully introduce a new product line, is whether Bendix can market that product successfully (Joines 9148–49; Nelson 10,039–40). Bendix concluded it could not successfully market LIPMESA shock absorbers in the United States (Joines 9189–90; Nelson 10,039–40).

434. Bendix possesses little, if any incentive to enter the domestic sale of replacement shock absorbers. Bendix owns no retail outlets which install shock absorbers (Joines 9148; Nelson 10,105–06, 10,111). Bendix has no defensive motive to enter the market because none of its major parts competitors are in the replacement shock absorber market (Joines 9146; Nelson 10,105–06, 10,109). Shock absorbers are not considered compatible with Bendix's major product line of replacement brake parts (Joines 9137; Nelson 10,105–06, 10,110).

435. TRW, a major domestic manufacturer of automotive engine parts[134] and replacement chassis parts, has been in the replacement shock absorber market since 1955 (Poe 8927–29; Nelson 9786, 9790, 10,112). Questor supplies TRW's shock absorber requirements (Poe

[133] Bendix acquired LIPMESA when Bendiberica was approached to acquire LIPMESA "to keep the business going" (Joines 9117). LIPMESA, a licensee of Allinquant, sells almost all of its output in Spain and none in the United States (Joines 9115–17).

[134] In addition, TRW's Replacement Division sells WDs and jobbers engine and chassis parts which it does not manufacture, as well as a general service line, timing gears and chains and shock absorbers, all of which it does not produce (Stapleton 3485; Poe 8928–29; Nelson 10,112–13).

8930–31). TRW's shock absorber line has not had any appreciable growth in sales, and has not achieved any significant market penetration (Poe 8932–35; Nelson 9787). TRW has not been making a substantial effort to promote and sell replacement shock absorbers (Bush 3294, 3320; Poe 8933; Nelson 10,114–15). TRW lacks marketing skills including the sales force and promotional programs, necessary to become a successful, significant seller of replacement shock absorbers, as TRW's primary business is the sale of engine and chassis parts which are not highly promotable items (Stapleton 3466–67; Poe 8933; Nelson 9789–90, 10,039–40, 10,929, 10,971). TRW also lacks substantial sales to mass merchandisers (Poe 8938; Nelson 10,112–13).

436. TRW has no plans to enter the manufacture of shock absorbers, and has never seriously considered such a move (Poe 8971–72). One of TRW's replacement market officials recommended that "it get out of the shock absorber business" (Poe 8935–36, 8957; Nelson 11,036–37). TRW's volume of shock absorbers business simply would not be sufficient to justify the investment in a shock absorber plant (Poe 8957–58). [102]Furthermore, TRW lacks the "background, patents, desire, factories, [and] pooled resources" necessary to produce shock absorbers (Poe 8957). TRW also lacks tube mills and shock absorber engineers (Nelson 10,049).

437. Moog, a leading seller of replacement chassis parts, unsuccessfully attempted to sell replacement shock absorbers as a reboxer and subsequently withdrew from being a reboxer of most types of shock absorbers (Bush 3259; Stapleton 3469; Nelson 9789, 10,115, 11,073). Like TRW, Moog lacks the skills necessary to successfully market replacement shock absorbers (Nelson 9789–90, 10,929).

438. Suppliers of tune-up parts are not likely potential entrants in the manufacture of shock absorbers. Tune-up shops do not install shock absorbers (Nedell 926). Tune-up mechanics are more skilled and more highly paid than those who install shock absorbers and ESP (Nedell 930–31; Glassman 1005–06). There was testimony that such tune-up mechanics would not be generally willing to install shock absorbers or ESP (Nedell 930–31).

439. Suppliers of transmission parts would not be considered likely potential entrants into shock absorbers. Transmission work is far more labor intensive than is the replacement of ESP or shock absorbers (Glassman 1003–04). Transmission repair shops generally do not install shock absorbers (Nedell 926). The mechanics who work in transmission shops are more skilled and more highly paid than those who install shock absorbers and ESP (Nedell 930–31; Glassman

1002). In general, transmission mechanics would not be willing to install shock absorbers or ESP (Nedell 930–31).

440. The leading tire companies sell few if any parts to WDs (McAdams 8988; Goodman 9067; Garfinkel 9201; Nelson 9790–92). B.F. Goodrich and Firestone manufacture no automotive parts sold to retail outlets although they sell a wide range of automotive parts, including shock absorbers and ESP, to their stores and franchised retail outlets, (Goodman 9068–69, 9074; Garfinkel 9203; Nelson 9944, 10,014, 10,020). Firestone once manufactured brake friction materials, as well as fan belts and hoses, but has ceased such activity (Goodman 9076; Nelson 9944, 10,021). Goodyear likewise sells a wide range of automotive parts, including shock absorbers and ESP to its stores and franchised retail outlets (McAdams 8988). The only automotive parts sold by Goodyear which it manufactures are fan belts and hoses, both rubber products (McAdams 8993; Nelson 9944, 10,014, 10,016). With respect to its line of fan belts, Goodyear is a small factor (Nelson 10,016).

441. Specifically, B.F. Goodrich, Firestone and Goodyear do not manufacture either shock absorbers or ESP (McAdams 8993; Goodman 9075; Garfinkel 9203). These firms have [103]no technological input into the shock absorbers which they purchase and have no technical expertise with regard to the design and production of shock absorbers (Garfinkel 9206; Nelson 9944–45, 10,013–14, 11,010). No tire company has been shown to have any intentions or plans to enter into the manufacture of shock absorbers (McAdams 8995; Goodman 9076; Garfinkel 9204; Nelson 10,013–14).

442. Mass merchants and tire companies would not be considered likely entrants into the manufacture of shock absorbers (Pond 866; Putman 1133; Buck 9422; Nelson 9940–45, 9975–76, 10,007–17, 10,021–24). Such firms lack design and manufacturing skills and, as a rule, do not manufacture any automobile parts (Kody 9350, 9355; Nelson 9791, 9943, 9976, 9983–84). Mass merchants do not have the warehouse organization or a suitable brand to sell to other wholesalers or retailers, and might encounter problems selling to their retail competitors as well (Nelson 9791, 9976, 9985, 9999, 10,001–04, 11,011). Mass merchants also lack the experience necessary to promote automotive products through the traditional channel of distribution (Nelson 10,003, 10,005). There is no showing in the record of any interest in entering the manufacture of shock absorbers on the part of any mass merchant or tire company (Nelson 9976). These firms have no incentive to enter the manufacture of shock absorbers, other than whatever is provided by their own purchases (Nelson 9977, 10,006).

443. As one muffler chain stated concerning such entry: "it would sort of keep the other manufacturers on their toes" (Nedell 944).

XV. The Perception of Walker as the Firm Most Likely To Deconcentrate the Shock Absorber Replacement Market

444. Walker was perceived as one of the few most likely entrants into the manufacture and sale of replacement shock absorbers by other producers of shock absorbers and ESP (Givens 480–84; Pond 771–73; Putman 1145; Moore 1248–49, 1325; Barna 1356; Nelson 11,128–29).

445. In the last ten years, Maremont considered Walker, Midas, Arvin and TRW as likely candidates to enter the replacement shock absorber business as manufacturers on a significant basis (Pond 771–73, 799–800; Nelson 10,591A, 11,129). This business judgment was based on the fact that Maremont and Questor already were in that market as manufacturers and Arvin and TRW were already reboxing shock absorbers (Pond 771–73, 799–800).

446. Maremont and Midas perceived Walker as the most likely and capable firm to enter the manufacture and sale of replacement shock absorbers because of Walker's dominant market position in the ESP aftermarket; its ability to manufacture **[104]**tubing for shock absorbers; its hydraulic know-how and manufacturing capability derived from Walker's hydraulic jack business; the compatibility of ESP and shock absorbers in their distribution, warehousing, and point of sale; the fact that Walker already markets and distributes shock absorbers; Tenneco's strong financial capabilities; and because of the fact that Walker's major ESP competitors were already in the replacement shock absorber market (Givens 480–84; Pond 771–76, 864–65; Moore 1247–49; Putman 1145–46).

447. Maremont regarded Walker as a highly efficient manufacturer of ESP, with extremely good technical credentials (Givens 482). Thus, Maremont perceived Walker as one of few if, not the most likely, entrant into shock absorbers from the standpoint of engineering and manufacturing capabilities (Givens 438–40, 480–84, 520–22; Pond 775–76). Walker was also perceived to be as likely as TRW to enter into the manufacture of replacement shock absorbers on a significant basis, based on Walker's marketing expertise; the fact that a number of its chief competitors had already entered; and because of its experience in dealing with under-the-car parts and comparable types of service items (Pond 773–75).

448. Because of its high level of historic profitability, Maremont

felt that the replacement shock absorber business "would be an enticing one to be in" (Pond 777, 856–57). The attractive nature of the replacement shock absorber business caused Maremont to invest very heavily in that business from 1968 to 1978, not only because of the business opportunity for Maremont, but also because "if we didn't invest, someone else would," and "to make that a less exciting or less, desirable business for competitors to expand in" (Pond 777–78, 857; Nelson 11,128; *see* Fleuelling 4022). Thus, Maremont expanded its plant and equipment as well as its inventory levels to provide a very high degree of availability (Pond 777–78; *see* Cook 1581). Maremont also invested in research and development on new replacement shock absorbers (Pond 778). Over the past eight or nine years, but more particularly over the three to four years prior to 1978, Maremont embarked on a "very aggressive cost reduction" program for its replacement shock absorber business (Pond 778–79, 855; *see* Cook 1581).

449. The ultimate consumer has been the chief beneficiary of Maremont's efforts in the replacement shock absorber market (Pond 779). Maremont's cost reductions have been passed on in the form of lower prices and, indeed, Maremont and also Monroe have been increasing their selling prices less rapidly than costs have been increasing (RX 58; RX 215; Pond 779, 854; Fleuelling 4071–72). The consumer also has benefitted by Maremont's enhanced availability of product (Pond 779–80).

450. The lower prices charged by Maremont have become industry wide prices (Pond 858–59; Putman 1132). The effect of **[105]** Maremont's pricing actions as well as those of Monroe have served to make the replacement shock absorber business both more competitive and less attractive to potential entrants than it otherwise would have been (Pond 858–59).

451. Based upon its own past history, Questor believed that Walker had the ability to become a significant manufacturer of replacement shock absorbers (Putman 1145).[135]

452. Midas and Blackstone officials were of the opinion that if Walker had acquired Blackstone instead of acquiring Monroe,

[135] Questor's chairman testified as follows:

Q In your opinion, Mr. Putman, did Walker or TENNECO have the ability to enter into manufacture and sale of shock absorbers without acquiring Monroe?

A Yes, sir. We did it, in our second phase of getting into the two-tube shock.

Q In your opinion, how could TENNECO or Walker have penetrated the replacement with shock absorbers?

A In my judgment, they could have done the same thing we did in our second phase. They could have set up a facility and hired the proper technical people and the production people and marketing people, to set up an organization and go out to some of the national accounts where their contacts are as good as ours and offer them a quality product at a fair price, and I think they would have gotten their share of business, same as we did.

(Putman 1145–46).

Walker could have become a significant seller of replacement shock absorbers in the United States (Moore 1325–26; Barna 1356). Blackstone believed that Walker's reputation in the traditional segment of the aftermarket would have assisted Walker in becoming a significant supplier of replacement shock absorbers in the United States (Barna 1360–61, *but see* Finding 413, *supra*). **[106]**

453. Blackstone does not consider TRW a likely entrant into the manufacture of shock absorbers because of their lack of success as a reboxer of shock absorbers serving the replacement market over an extended period (Barna 1367). Furthermore, TRW had informed Blackstone that the firm was not interested in buying shock absorbers from Blackstone as they were "having difficulties" (Barna 1362, 1366). TRW had also informed Blackstone that they "would love to sell us [Blackstone] their inventory [of shock absorbers]" (Barna 1362–63, 1366). Maremont did not consider TRW to be as likely an entrant into the significant manufacture of replacement shock absorbers as Walker (Pond 773–76). As stated by Maremont's then senior vice-president (now president): "My estimate would be that it would be a much easier entry for an exhaust manufacturer into the shock absorber business from a manufacturing standpoint than it would be for a suspension parts manufacturer [TRW]" (Pond 776).

454. Maremont did not consider any foreign shock absorber manufacturer as likely to become a significant factor in the United States replacement market (Stewart 9255, 9263, 9276–77; Nelson 9940). A knowledgeable official testified that such firms lack the necessary domestic distribution system, knowledge of the U.S. replacement market, proper sales force, marketing programs and sales promotion programs (Stewart 9256–57, 9277–79, 9288–89).

455. No witness identified Sears Roebuck, the leading purchaser of replacement shock absorbers, as being a likely entrant into the manufacture of shock absorbers (Pond 866; Putman 1133; Buck 9922; Nelson 10,007–08).

XVI. Monroe as a Potential Entrant into the ESP Market

456. Monroe had been considering diversification of its basically one product company for a number of years[136] (Fleuelling 3948). In

[136] In its 1972 Annual Report Monroe stated that: "[w]e plan to continue looking for products with good potential in the aftermarket which could be fitted into our marketing structure" (CX 145E).

1975, after its entry into oil filters, the company reaffirmed its goal of continued diversification.[137] [107]

457. Monroe sought to add a second or third major automotive product line, which could be built into a strong second or third industry position (CX 178A). The type of financial return looked for was one which would result in $2 million in profit after taxes (CX 178A).

458. Monroe considered diversification through acquisition, and established acquisition criteria[138] (CX 177B–C).

459. Monroe preferred to acquire an "under carriage" producer (CX 179A). By adopting this acquisition strategy, Monroe felt it would be in a position to supply the large, emerging retail chains with an "under carriage" package for their installation shops, and thus mitigate any threatened loss of its market penetration (CX 179A). Front-end equipment and parts manufacturers, brake and brake parts manufacturers, and ESP producers were included in the "under carriage" category by Monroe (CX 179A–B; Fleuelling 5768–69). ESP producers were considered to be compatible with Monroe, because of the success Midas was enjoying in selling both ESP and shocks (CX 179B).

460. Following its determination that ESP met its acquisition criteria (CX 177A–B), Monroe took steps to acquire [108]the Arvin Company,[139] hiring a broker to assist in this effort. On February 13, 1974, the broker transmitted to Monroe a comparison of Monroe's and Arvin's financial data, and an analysis of the effects of offering differing amounts of Monroe stock in exchange for Arvin stock (CX 182A–E). On February 25, 1974, Monroe's Chairman of the Board met with Arvin's President and Chairman to discuss the acquisition of Arvin by Monroe (CX 183; Baker 579–80; Fleuelling 3947–48, 3963, 5767–68; *see* CX 208Z–47, Admission No. 360). On March 29, 1974, Monroe's broker submitted additional statistics to the company pertaining to the possible Arvin acquisition, along with other relevant considerations (CX 185A–D; *see* Baker 582). The proposed Arvin acquisition proceeded so far as discussing the mechanics of

[137] Monroe stated in its 1975 Annual Report that, "[t]he Company will continue to be alert to opportunities represented by additional product lines with good sales potential, suitable for marketing through our well-established world-wide distribution system" (CX 142E; *see* CX 208Z–47, Admission No. 361).

[138] Some of the acquisition criteria were:

- The profit potential should be at least an immediate return of 10% on investment.
- Products involved must be involved in a growth phase, not a static or declining phase.
- Acquire brand name products of a specialty character which are related to our current area of business.
- Products which could respond to aggressive advertising and merchandising.
- Products which could lend themselves to our distribution channels and manufacturing skills.

(CX 177B)

[139] Arvin, which sells ESP primarily to the OE market, accounted for approximately 10% of ESP sales to the replacement market in 1976 (CX 265 *in camera;* Nelson 11,027–28 *in camera*).

putting the two firms together organizationally, such as selecting a name for the combination, a proposed Board of Directors, a list of officers and a corporate organization structure (CX 186; Baker 582). However, the merger was never consummated, and, according to Mr. Fleuelling of Walker, was never seriously considered (Fleuelling 3947–48, 3963, 5767).

461. The combination of Monroe and Arvin would have strengthened Arvin's position in the ESP replacement market by adding Monroe's excellent merchandising ability to the lesser marketing skills possessed by Arvin (Baker 588–89).

462. The record identifies an additional ESP acquisition candidate. During 1975, the parent of Muffler Dynamics was attempting to sell the company (Kittridge 1411–12, 1441 *in camera*). Muffler Dynamics is a small replacement ESP producer, manufacturing four lines of mufflers, all of which are consolidated lines designed for sale primarily to mass merchants and muffler installation shops (Kittridge 1403–05, 1409). Muffler Dynamics does not sell to the traditional segment of the replacement market (Kittridge 1452). Muffler Dynamics has the present capacity to make about two million mufflers per annum, having an approximate value of $15 million (Kittridge 1405–06). Muffler Dynamics has no tube mill, but does possess bending equipment which could be used to produce pipes (Kittridge 1406–07). Sales of Muffler Dynamics ESP are made primarily through independent sales representatives, rather than by salesmen of its own (Kittridge 1429).

463. In the opinion of Muffler Dynamics' official, Mr. Kittridge, the combination of his company and Monroe could **[109]**have become a substantial factor in the U.S. replacement ESP market (Kittridge 1424).

464. Prior to its own acquisition, there was some interest on Monroe's part in acquiring Walker (CX 4C). As noted, only Monroe among the major shock absorber replacement marketers did not manufacture or sell ESP prior to its acquisition in 1977 (Moore 1258 *in camera*).

465. Armstrong, a leading British shock absorber producer, acquired a British ESP producer in 1974 (Hooper 2614). At the time of its acquisition, that ESP producer had 4 to 4.5 percent of the ESP replacement market in the United Kingdom (Hooper 2616). Under Armstrong, the share of market held by that ESP producer has risen to 9% (Hooper 2616). **[110]**

XVII. Legal Discussion

The Commission's complaint advances three theories of violation of Section 7.[140] These involve: (1) horizontal aspects of the merger; (2) the doctrine of potential competition, both actual and perceived; and (3) allegations of entrenchment. Under my view of the facts and controlling legal precedents, none of these theories are viable in this case.

Before discussing these points, however, two issues regarding relevant product market require attention.[141]

A. The Shock Absorber Cluster Market

As discussed at length in the findings, shock absorbers and ESP are manufactured for both OE installation and replacement purposes (Findings 55–169). To assess the competitive consequences of Walker's acquisition of Monroe, the complaint focuses on the replacement category, declaring the relevant markets for both products to be their manufacture and sale to (1) the entire U.S. replacement market, and to (2) the independent aftermarket segment thereof (*i.e.,* the replacement market minus OE service sales).[142]

In the case of shock absorbers, while MacPherson struts and steering dampers are not interchangeable with conventional shock absorbers, it is clear that they perform the same type of function on vehicles. Each is used for hydraulic dissipation of mechanical energy arising from road imperfections and vehicle dynamics. The production of each involves the same or similar technology, and each contain common working components (a metal cylinder filled with hydraulic fluid, into which a piston mechanism is inserted, with valving to permit a measured flow of [111]fluid). Each is marketed together by the leading shock absorber manufacturers, through the same replacement channels to the same customers (Findings 25–54). Accordingly, it is not inappropriate to consider these products as being in a single cluster market.

There is legal precedent of long duration to support the recogni-

[140] Violation of Section 5 FTC Act was also alleged, resulting from the alleged Section 7 Clayton Act violation. This was not independently pursued at the hearings, and thus requires no independent resolution in the initial decision.

[141] There is no dispute that the relevant geographic market for both shock absorbers and ESP is the United States as a whole (Finding 24).

[142] OE service refers to those products manufactured for sale to OE vehicle producers for distribution to their dealer outlets (Finding 170).

tion of a cluster market, where technical or commercial realities permit such classification.[143] In its 1963 decision in *Philadelphia National Bank,*[144] the Supreme Court did not have any difficulty in determining that (374 U.S. at 356):

*** the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking" *** composes a distinct line of commerce.

Commercial banking was found by the Supreme Court to be a distinct line of commerce even though the various services and products offered by commercial banks are distinguishable from each other, and in some instances are also provided by financial institution other than commercial banks. The products and services in question, such as personal loans, checking accounts, estate and trust planning and safety deposit boxes, are clearly not interchangeable. The Court emphasized that it was the cluster of products and services which commercial banks offered as a full line that made commercial banking a distinct line of commerce as a matter of trade reality. The Supreme Court later reaffirmed its holding that the commercial banking industry as a [112]whole was a proper line of commerce for Section 7 purposes.[145]

The Commission has used similar rational in numerous cases. As long ago as 1960, for example, in the *Spalding* case,[146] the Commission found the existence of an athletic goods market, which contained all manner of non-interchangeable sports equipment. Recent Commission decisions include *Brunswick Corp.,* Dkt. No. 9028, Nov. 9, 1979, Slip Op. at 6–10; *Kaiser Aluminum and Chemical Corp.,* 93 F.T.C. 764, 833–39 (1979); *Coca-Cola Bottling Co. of New York, Inc.,* 93 F.T.C. 110, 199–205 (1979).

B. Supply Cross-Elasticity for OE and Replacement Shock Absorbers and ESP

As regards both shock absorbers and ESP, it is respondent's elaborate contention (1) that the concept of cross-elasticity of supply

[143] *Liggett & Myers Inc.,* 87 F.T.C. 1074 (1976), *aff'd,* 567 F.2d 1273 (4th Cir. 1977); *British Oxygen Co., Ltd.,* 86 F.T.C. 1241, 1345–46 (1975), *rev'd on other grounds and remanded sub. nom.; BOC Int'l, Ltd.* v. *FTC,* 557 F.2d 24 (2d Cir. 1977); *United States* v. *Ford Motor Co.,* 286 F. Supp. 407, 411–16 (E.D. Mich. 1968), *aff'd,* 405 U.S. 562 (1972); *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 10–12 (7th Cir. 1971); and *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966). *Cf. Sterling Drug, Inc.,* 80 F.T.C. 477, 555 (1972); *United States* v. *Bethlehem Steel Corp., supra,* 168 F. Supp. 576, 594 (S.D.N.Y. 1958).

[144] 374 U.S. 321 (1963).

[145] *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. 350 (1970) (commercial banking); *see also, United States* v. *Grinnell Corp.,* 384 U.S. 566 (1966) (central station protective services); *British Oxygen Co., Ltd.,* 86 F.T.C. 1241, *rev'd on other grounds, sub nom., BOC Int'l, Ltd.* v. *FTC,* 557 F.2d 24 (2d Cir. 1977) (industrial gases); *United States* v. *Hughes Tool Co.,* 415 F. Supp. 637 (S.D. Cal. 1976) (specialized surface rotary drilling equipment); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576 (S.D.N.Y. 1958) (iron and steel industry).

[146] *A.G. Spalding & Bros., Inc.,* 56 F.T.C. 1125, 1160 (1960); *aff'd,* 301 F.2d 585, 606 (3d Cir. 1962).

is invariably co-extensive with production flexibility, and (2) that the evidence shows such a degree of shifts in production as between OE and replacement products that the latter simply cannot be regarded as being in a separate submarket (*See* RPF 27–34, 38–114, RRPF 16–30). Complaint counsel differ sharply on both points (CRPF pp. 2–12).

It is difficult for me to equate production with supply in the overall sense. To focus solely on production factors would overlook other factors involved in supplying a product, such as distributing and marketing. As to these, the record shows significant differences as to OE and replacement products (Findings 58–97).

In the *Budd* case, 86 F.T.C. 518, 571–72 (1975), the Commission's decision not to further subdivide the overall "van [113]trailer" market into submarkets for "open-top" and "closed-top", was not based solely upon considerations of production flexibility. Its evaluation of cross-elasticity of supply included the "interchangeability of production *and distribution* facilities" between the two products, enabling a manufacturer of one to "shift readily to the production *and sale*" of the other (emphasis added). The Commission stated:

> Because the record establishes such a high degree of cross-elasticity of production, *and identical marketing ease,* among van trailers, we conclude that "open-top" and "closed-top" van trailers do not constitute separate submarkets.

(86 F.T.C. at 572, emphasis added)

Apart from this consideration, there is much testimony and data in the record concerning the ability to, and the feasibility of, switching OE and replacement shock absorber and ESP production (Findings 98–116, 156–69).

Complaint counsel maintain that even if the record demonstrates complete production flexibility between OE and replacement, respondent's contention based on this assertion must fail as a matter of law. I agree with their position.

The Supreme Court in *Brown Shoe,*[147] referred to production facilities as but one of seven enumerated submarket criteria.[148] Indeed, as complaint counsel point out, in that landmark case the Court upheld separate submarkets for men's, women's and children's shoes based upon four criteria, *viz.,* public recognition, separate plants, peculiar product characteristics and distinct customers. This was despite the fact found by the court below that "the history of Brown's own factories reveals that a single plant may *** without undue difficulty be shifted from the production of children's shoes to men's or women's shoes or vice versa."[149]

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[147] *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).

[148] 370 U.S. at 325.

[149] 370 U.S. at 367–68 (Harlan, J., dissenting in part and concurring in part).

In *United States* v. *Aluminum Co. of America,* 377 U.S. 271 **[114]** (1964), the lower court had found that:[150]

> [T]here is complete manufacturing interchangeability between copper and aluminum, and manufacturers constantly review their product lines and "switch readily from one product or conductor metal to another in accordance with market conditions."

Nevertheless, the Supreme Court found separate submarkets on the basis of only two criteria, distinct prices, and peculiar characteristics and uses.[151]

Based upon such precedents, together with the decisions of lower courts,[152] and those of the Commission,[153] it is clear that production flexibility is but one factor to consider in determining the relevant product market in any given case.

We turn now to consider the theories of violation. **[115]**115]

I

Horizontal Aspects

Among the alleged anticompetitive effects of the Walker-Monroe merger is that: "actual competition between Tenneco and Monroe and between Tenneco and other producers of shock absorbers for domestic sale to the replacement market and the independent aftermarket has been eliminated."

This allegation cannot be sustained because at the time of the merger Tenneco was not a producer of shock absorbers for the following reasons:

(1) In 1975 and 1976, Walker sold a small number of shock absorbers to muffler shops which it had purchased from Monroe as a reboxer (n.8 *supra*). It did not manufacture those units.

(2) Through its Mechanex Division, under which the assets acquired from Triple S Industries were placed, Walker purchases steering damper cylinders, adds bracketry and sells a line of steering dampers (CX 43A–H). This does not make Walker a shock absorber

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[150] 377 U.S. at 285 (Stewart, J., dissenting).

[151] 377 U.S. at 277.

[152] *See, e.g., United States* v. *Black & Decker Mfg. Co.,* 430 F. Supp. 729, 736–41 (D. Md. 1976); *see also L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 9–11 (7th Cir. 1971); *Reynolds Metals Co.* v. *FTC,* 309 F.2d 223, 225–29 (D.C. Cir. 1962); *Crown Zellerbach Corp.* v. *FTC,* 296 F.2d 800, 812–14 (9th Cir. 1961), *cert. denied,* 370 U.S. 937 (1962). Additional cases on point include *United States* v. *Pennzoil,* 252 F. Supp. 962, 975 (W.D. Pa. 1965); and *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20 (3d Cir. 1978), wherein the court stated at p.29, n.30:

> It is true there was testimony that the same production facilities can be used to turn out both steel and aluminum culvert, and that the same companies often manufacture both. This, however, is not enough to preclude the existence of submarkets as a matter of law.

[153] *See, e.g., Kaiser Aluminum & Chemical Corp.,* 93 F.T.C. 764, 834 (1979); *Coca-Cola Bottling Co. of New York,* 93 F.T.C. 110, 204–05 (1977).

manufacturer, even though the Mechanex Division manufactures bracketry for mounting the product (Prescott 11,284–85).[154]

Nevertheless, even if one were to assume that respondent were a shock absorber manufacturer, and were to look at its shock absorber sales in best light, these would total in each of the years 1975 and 1976 approximately 100,000 units, less than 0.2% of the replacement unit market (RX 550A, 550D *in camera*; N. Wright 11,849–52A). In dollar figures, the market share would be less than .3% in 1975 and 1976 in both the replacement market and independent aftermarket submarket (CX 261A, 262, 263, 266 *in camera*). This seems clearly to fall within the *de minimis* concept recognized by *Brown Shoe,* 370 U.S. at 329.

Nor are the cases cited by complaint counsel of assistance on this point.[155] In each case, the small company acquired [116]had at least some firm base or facility which could be utilized for expansion by the acquiring firm. In the present case, respondent in this case to "expand" its role as a "shock absorber manufacturer," would be tantamount to entering the market *de novo* (*See* Nelson 10,785–86).

Accordingly, the complaint's allegation based upon an alleged "horizontal overlap" must be rejected.

II

Potential Competition

Both branches of the doctrine of potential competition, actual and perceived, are in issue in this product extension merger case. The "actual" theory involves the elimination of entry into a market by an actual potential competitor, *i.e.,* a company, but for its acquisition of an existing competitor in a market, would itself have entered that market either by *de novo* means or by toehold acquisition. The "perceived" concept involves the elimination of a firm situated at the "edge" of a market, perceived to be a threat to enter that market, and thus exercising a procompetitive discipline upon the activities of companies presently operating therein. *See United States* v. *Marine Bancorporation,* 418 U.S. 602 (1974); *United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973); *Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972); *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967);

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[154] The shock absorber cylinder, of course, is the heart of the steering damper, and the basis for including it in the shock absorber cluster market, *supra.*

[155] *United States* v. *Aluminum Co. of America (Alcoa-Rome),* 377 U.S. 271, 280–81 (1964) (27.8% acquiring 1.3%); *FTC* v. *Pepsico Inc.,* 477 F.2d 24, 27–28 (2d Cir. 1973) (40% acquiring 0.3%); *Stanley Works* v. *FTC,* 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973) (1% acquiring 22%); *Retail Credit Co.,* 92 F.T.C. 1, 143 (1978) (2.8% acquiring 49.3%).

United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

While the Supreme Court has fully endorsed the "perceived" test, it has expressly reserved ruling upon the validity of the "actual" potential theory in both its *Falstaff* and *Marine Bancorporation* decisions. Nevertheless, it is a viable approach in the eyes of numerous lower federal courts and the Federal Trade Commission.[156] **[117]**

A. Actual Potential Entry

According to complaint counsel, the *Marine Bancorporation* case sets forth certain elements which must be satisfied before the doctrine of potential competition may be applicable (CPF, p. 114):

(1) The market in question must be concentrated;
(2) There must be feasible alternative methods of entry other than by the merger in question; and
(3) The alternative means must offer a reasonable prospect of long term structural improvement or other benefits in the target market.

There is no question that both the shock absorber and ESP replacement markets are highly concentrated. As set out in the findings, for shock absorbers in 1976 the top four figure was 92.9% (95% in the independent aftermarket); for ESP in 1976 the top four figure was 73.5% (78.7% in the independent segment) (Findings 185, 186, 208, 219).

As for the second point, the criterion concerning feasible alternatives, this, according to complaint counsel, involves an assessment of entry barriers and the acquiring firm's capabilities, characteristics and economic incentive to enter the market in question.[157] Since there is no dispute between the parties that entry barriers for both shock absorbers and ESP are high, let us turn to the other indicia concerning feasible alternatives.

According to Professor Brodley,[158] the question of whether the acquiring firm had the capability, interest and incentive to enter the market by alternative means, and the feasibility of **[118]**this, has invited:[159]

*** Virtually open-ended inquiry into a broad spectrum of financial, technological, and marketing issues *** Among the issues explored in recent cases are technological

[156] See cases and authorities cited in the second paragraph of footnote 25 in the Commission's decision in the *Brunswick* case, Dkt. No. 9028, November 9, 1979 (Slip Op. at 17–18) [94 F.T.C. 1174 at 1267].

[157] CPF, p.114, n.95.

[158] Brodley, Potential Competition Mergers: A Structural Synthesis, 87 Yale L.J. 1 (1977).

[159] *Id.* at 23.

capability, capital availability, marketing and advertising abilities, market overlap between the target and acquiring firms, predicted returns from entry as compared with benchmark, or target returns, other incentives or disincentives to entry (such as diversification needs), growth patterns of the acquiring firm (including past entry into similar markets), growth of demand in the target market, availability of smaller or "toehold" acquisitions at prices acceptable to both buyer and seller, specific entry barriers (such as scale economies, product differentiation, and high absolute cost requirements), and managerial interest and intentions as to entry.

There is evidence in this record respecting most, if not all, of those points. Detailed findings have been made concerning, *inter alia,* technical similarities in producing shock absorbers and ESP (Findings 268–77, 346–53); their distribution processes (Findings 278–95); their marketing and merchandising methods (Findings 296–318); their common competitors and customers (Findings 319–39); and synergistic savings (Findings 340–45). The findings have covered points such as respondent's substantial interest in the shock absorber business, and the steps taken in this regard, including the acquisition of a small company (Findings 354–88). Other findings have covered respondent's economic incentives (at least in its eyes before the merger) regarding shock absorbers (*see, e.g.,* Findings 199–200, 203, 356).

In fact, the evidence adduced by complaint counsel as to respondent's capability, interest and incentive is, in my judgment, impressive, and amply substantiates those points. That is, except for one particular: absent the Monroe merger, how was respondent, as a practical matter, to enter the replacement shock absorber market in any meaningful way? **[119]**

In this connection, there is no reliable record evidence of which I am aware, that Walker was actually planning to enter the shock absorber market *de novo.*

As for toehold acquisitions, what shock absorber manufacturers were available for purchase which might offer a viable entry vehicle? My reading of the record convinces me that there were *none,* at least at the time of the Monroe acquisition.

As for Armstrong, the record shows some interest on respondent's part in that company, going back to 1966–68 discussions (Findings 359–64). Respondent continued to maintain its interest prior to the merger, but the record shows a lack of interest on Armstrong's part (Findings 389–400).

As for DeCarbon, while some preliminary discussions occurred, the record shows that failure to agree on an initial price blocked a possible acquisition from the outset (Findings 401–09).

As for Blackstone, the only non-foreign toehold cited in the record as possibly available, this company has apparently been for sale

since 1974, with no purchaser thus far. There was evidence that Blackstone was an unattractive candidate for entry (Findings 410–13). The record does not indicate any interest on the part of respondent to acquire that company, or any effort made in that direction.

The names of other shock absorber manufacturers (all foreign) appear in the record. Their prospects as toehold acquisitions for respondent are unclear (Findings 414–27).

Thus, it has not been established in this record that feasible alternative methods of entry existed for respondent, at the time it acquired Monroe. Under presently governing case law, violation has not been shown. *See, e.g., United States* v. *Siemens Corp.,* [1980] Trade Reg. Rep. (CCH) ¶ 63,287.[160] **[120]**

B. Perceived Potential Entry

The record in this case contains testimony by a number of industry witnesses that they perceived Walker to be one of the most likely entrants into the shock absorber replacement market (Findings 444 *et seq.*).

To the elements of proof recited by complaint counsel respecting actual potential competition, *supra,* p. 117, another element must be added respecting the perceived potential entry theory, *i.e.,* a "probability that the acquiring firm prompted premerger procompetitive effects within the target market."[161]

In support of this proposition, complaint counsel rely to a great extent upon the testimony of Mr. Byron Pond, a senior Maremont official (*see* Transcript pp. 771–79, 858–59, 864–65). Respondent interprets Mr. Pond's testimony to mean that the requisite effects were not shown.

I have examined this testimony carefully, and while it may not be entirely clear, it appears to support respondent's view. The crucial testimony was given at Transcript pp. 776–77:

> Q. Did the presence of Walker, IPC or Midas and/or TRW as likely potential entrants into the shock absorber market, have any effect on Maremont's decisions, business decisions?
>
> A. I don't think that we looked specifically at competitors on a periodic basis or potential competitors, in developing our strategy. I think we developed our strategy and approach to the business based on how we perceive it and how we perceived the opportunities.

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[160] Similarly, I can find no reliable evidence establishing, under current legal standards, that Monroe was planning to enter the ESP replacement market *de novo.* As for its possible acquisition of Arvin, the merger was never consummated, and, according to the testimony of witness Fleuelling, never seriously contemplated. *See* Findings 456–65.

[161] *CPF, p. 114.*

To me, this testimony means that Maremont did not take potential competitors, including respondent, directly into account in making its business decisions.

Mr. Pond further testified concerning the attractive nature of the shock absorber business, and Maremont's heavy investments in it over the past ten years. He stated that "if we didn't invest, someone else would," and that such investments by Maremont would make the shock absorber business "a less exciting or less desirable business for competitors to expand in." (Pond 778). [121]

This latter testimony can be read to refer to potential competitors, or it can be read to refer to competitors presently in the market, or to both. It is simply unclear.[162]

Accordingly, I find the record evidence insufficient to sustain the allegation as to "edge" effect.[163]

III. Entrenchment

There is legal precedent for declaring a merger unlawful which confers a decisive advantage on a dominant competitor, which creates a reasonable probability of entrenching that company's market position. *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967); *General Foods Corp.* v. *FTC,* 386 F.2d 936 (3d Cir. 1967). See legal analysis set forth in *United States* v. *ITT Corp.,* 324 F.Supp. 19, 24 (D. Conn. 1970), and in the court's earlier opinion in that case, 306 F.Supp. 766, 775–76 (1969). In order for this theory of liability to attach it must be demonstrated that the acquired company was prior to the merger, an already dominant competitor in the relevant market. *Beatrice Foods Co.,* 86 F.T.C. 1, 66 (1965).

In the present case, the record shows that Monroe did not dominate the shock absorber replacement market at the time of its acquisition by Walker. It was facing aggressive competition from Maremont, which already had ESP products in its arsenal. (Finding 197). Thus, the entrenchment theory does not apply to Monroe.

While Walker is the leading ESP producer (Finding 210), its replacement market share at the time of the merger was just over 30% (Nelson 10,377 *in camera*). In no sense can it be considered a giant among pygmies or to dwarf its ESP competitors. None of its major competitors, Maremont, Arvin [122]Questor, and Midas (IC Industries) can be considered as small companies. Its two largest

[162] Complaint counsel rely upon certain language in *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1257 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974), that the necessary "edge" effect may be presumed. Whatever the present validity of this holding, it conflicts with the Pond testimony, that Maremont's business decisions were not specifically influenced by potential competitors, including respondent.

[163] There was no record evidence that Monroe was perceived as a potential entrant into the replacement ESP replacement market.

competitors in the replacement ESP market, Maremont and Questor, already possess shock absorber facilities. It is difficult to see how Walker automatically becomes entrenched by acquiring this capability.

XVIII. ORDER

It is ordered, That the complaint herein be dismissed.

OPINION OF THE COMMISSION

BY DIXON, COMMISSIONER:

This matter involves a challenge to the acquisition of the Monroe Automotive Equipment Company by Tenneco, Inc., under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. At issue is whether the merger was likely to reduce competition in either the market for replacement shock absorbers or the market for replacement exhaust system parts (ESP) through the elimination of potential competition in either market, the elimination of actual competition in the replacement shock absorber market, and the entrenchment of Monroe in the replacement shock absorber market.[1] Despite the variety of the allegations, the focus of the litigation, and of this [2]opinion as well, is on the effect of the merger upon potential competition in the market for replacement shock absorbers.

The Administrative Law Judge (ALJ) below, although making extensive findings favorable to Complaint Counsel, dismissed all counts in the complaint, and Complaint Counsel appeal. We reverse in part, finding that the acquisition eliminated potential competition in the sale of replacement shock absorbers.[2]

[1] The following abbreviations are used herein:

I.D.	–	Initial Decision Finding of Fact No.
I.D., p.	–	Initial Decision Page No.
Tr.	–	Transcript of Testimony Page No.
CX	–	Complaint Counsel's Exhibit No.
RX	–	Respondent's Exhibit No.
RAB	–	Respondent's Answering Brief Page No.
RPF	–	Respondent's Proposed Finding No.
RRPF	–	Respondent's Reply Proposed Finding No.
CCPF	–	Complaint Counsel's Proposed Finding No.

[2] We affirm, *infra* n.20, the ALJ's dismissal of the claim that the merger lessened actual competition in the replacement shock absorber market. However, given our analysis of the impact of the merger on potential competition in that market and the remedy which necessarily ensues, it is unnecessary to reach the further claims that the merger unlawfully entrenched Monroe and that Monroe was a potential entrant into the replacement exhaust system market.

Potential Competition

The term "potential competition" encompasses two distinct but closely intertwined theories of violation: actual and perceived potential competition. A merger may be challenged for eliminating perceived potential competition when it removes from the edge of a concentrated market a firm likely to have been exerting a salutary policing effect upon conduct within the oligopoly. To determine whether a firm is so positioned, and thereby so perceived, requires an examination of its "characteristics, capabilities and economic incentive" to attempt entry into the market in question, *United States* v. *Marine Bancorporation,* 418 U.S. 602, 624 (1974); *see also, United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526, 533–34 (1973). Moreover, for the loss of this firm to be significant, there must be few other firms similarly positioned, *see, e.g., Heublein, Inc.,* 96 F.T.C. 385, 588–89 (1980). A challenge based on the loss of an actual potential entrant involves a similar inquiry, but two additional factors must exist before there is the probability that the merger will substantially lessen competition: that the firm had means to enter other than through the challenged acquisition and that those alternative means were likely to have had a procompetitive effect on the target market. *United States* v. *Marine Bancorporation, Inc., supra,* 418 U.S. at 633.[3] The inquiry also differs in that we are unconcerned with how target [3]market firms are likely to perceive the actual potential entrant; the procompetitive benefit lies in the future, when entry is attempted, rather than in current reactions by fearful target market firms. Moreover, a firm may be an actual potential entrant without meeting all the requisites of a perceived potential entrant. The apparent objective economic evidence, for example, may exclude a firm from being seen as a potential entrant, yet it may possess plans and hidden capabilities which establish it as an actual potential entrant.

This case involves charges that Tenneco's acquisition of Monroe eliminated both actual and perceived potential competition in the replacement shock absorber market, and we find violation on both counts. Our analysis of the evidence, necessarily lengthy given the voluminous record, focuses first on Tenneco as a perceived potential entrant. As discussed, however, there is considerable overlap between the two theories, so our examination of the characteristics,

[3] Although the Supreme Court has delineated the elements of actual potential doctrine, it has expressly reserved approval of the doctrine itself. *United States* v. *Marine Bancorporation, supra,* 418 U.S. at 625; *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 537. We believe, however, that approval will eventually come. *See, Heublein, Inc., supra.* n.22; *Brunswick Corp.,* 94 F.T.C. 1174, 1267 n.25 (1979), *aff'd, Yamaha Motor Co., Ltd.* v. *Federal Trade Commission,* slip. op. (8th Cir., July 29, 1981) and authorities cited therein.

capabilities and economic incentives which relate to Tenneco as an actual potential entrant will be included in the discussion of the perceived case. Although the great bulk of the evidence related to these elements applies with equal force to either theory, certain aspects do not, and these points will be highlighted as they occur in the discussion.

The Firms

Tenneco, Inc. is a diverse enterprise with interests in, *inter alia,* shipbuilding, farm equipment, automotive parts, petroleum, chemicals and packaging. Tenneco was the 15th largest industrial concern in the United States in 1975 with assets of over $6.5 billion. I.D. 3. One subsidiary, the Walker Manufacturing Division, manufactures a complete line of exhaust system parts for passenger cars and light and heavy-duty trucks. I.D. 4. The Mechanex Corporation, a subsidiary of Walker, distributes a line of automotive steering dampers, a type of shock absorber mounted horizontally between the front wheels of a vehicle. I.D. 5. Walker also manufactures a line of automotive lifting equipment, including air and hydraulic-powered jacks. I.D. 6. [4]

Monroe has long been a major manufacturer of an extensive line of automotive shock absorbers, including conventional shock absorbers, steering dampers and MacPherson strut cartridges. *See* discussion, *infra,* 5. Monroe produces high quality products, and the brand name is well known. The bulk of Monroe's output, 81 percent in 1976, is sold in the replacement market through warehouse distributors, chain stores, other private brands, and vehicle manufacturers. Although it has long been a single product company, it added a new line of replacement automotive oil filters in 1975. In fiscal 1976, Monroe's net income exceeded $5 million on domestic sales of over $128 million. Its total assets that year were valued at over $185 million. The acquisition of Monroe by Tenneco was announced on December 20, 1976, and was consummated on July 29 of the following year. I.D. 16–19, 21–22, CX 143G, 175.

The Relevant Markets

Automotive shock absorbers are devices which dampen motion by converting mechanical energy into the controlled movement of a hydraulic fluid, and disperse that energy as heat into the atmosphere. I.D. 26. Shock absorbers consist of one or more steel tubes which contain the hydraulic cylinder, a piston and rod which moves through the cylinder, hydraulic valves, hydraulic fluid, springs, seals

and bearings. CX 220 Z–8 to Z–16. I.D. 348–49. Shock absorbers have no substitutes in automotive applications. I.D. 25.

A shock absorber is mounted vertically at each wheel between the vehicle body and the wheel. *See, e.g.,* CX 220 Z–8 to Z–10, I.D. 42. Mounting methods vary; there are conventional and newer "McPherson strut"[4] designs. The latter design has seen growing popularity in recent years, particularly in front suspension applications, because it is a more compact method of suspending a wheel than conventional suspension designs. I.D. 35. Despite external differences in mounting and appearance, the inner shock absorbing parts of a McPherson strut are like those of conventional shock absorbers, and like conventional shock absorbers, wear out and require periodic replacement.[5] I.D. 84. [5]

As noted above, steering dampers are another form of "shock absorber." Mounted horizontally between the front wheels of certain vehicles, this device absorbs road shocks and oscillations in the steering system. I.D. 42, 45. Steering dampers differ from conventional shock absorbers primarily in that different hardware is used to mount them, and a "gas bag" is sometimes added due to the product's horizontal positioning. The internal workings of steering dampers, however, consist of much the same components as conventional shock absorbers. I.D. 47.

"Exhaust system parts" (ESP) comprise the mufflers and pipes which convey and quiet engine exhaust gases from the motor to the rear of the vehicle, and also include the clamps, brackets and other hardware necessary to connect the pieces and attach them to the car body. I.D. 55. Exhaust system pipes consist of hollow steel tubing bent to follow a prescribed path through a vehicle's undercarriage, and fashioned at the ends to attach to the engine exhaust manifold, other pipes, or a muffler. Thus, the end of a pipe may bear an additional flange or simply have been expanded to slip over another pipe. Mufflers are oval or round cylinders fabricated from sheet metal, and contain various sheet metal baffles to absorb sound. *See, generally,* Tr. 1796–1809.

The ALJ found these two overall product markets of shock absorbers and ESP. *See,* I.D. pp. 110–12.

The ALJ also found three submarkets within each product market,

[4] In addition, there are variants on the conventional shock absorber, *i.e.,* spring-assisted conventional shock absorbers and air-adjustable shock absorbers. I.D. 50.

[5] There are three methods of servicing a McPherson strut. One is to discard the entire strut and replace it with a new unit. Another is to disassemble the old strut, discard the old "plumbing" (seals, valves, fluid and the like), assemble new internal workings from a kit of new parts and reassemble the strut. The most popular method, however, is to disassemble the unit, discard the old, internal workings, and replace them with a factory assembled and sealed shock absorber cartridge, much like the way a refill is inserted in a ball-point pen. *See* CX 172 A–C, 225, 274, I.D. 38.

based on whether the part was for the manufacture of a new vehicle or replacement installation, and within the replacement market based primarily on lines of distribution. The [6]original equipment (OE) submarkets for both shock absorbers and ESP, which involve sales to vehicle manufacturers, are very distinct from the respective replacement markets. Product line, production technique, customers, prices, distribution methods and product demand vary significantly between each OE and replacement market, and these differences between markets are similar for shock absorbers and ESP.

Buyers in both OE markets are highly sophisticated in terms of the engineering and price of the parts they purchase. I.D. 69–70, 132–33, 136. Profit margins in the OE market are lower than in the replacement market. I.D. 73–74, 82, 122–23, 133–39. Design is largely dictated to the would-be OE supplier by the vehicle manufacturer, I.D. 68–70, 131–33, while replacement market manufacturers determine their own specifications, construction methods and materials within the overall constraints of a vehicle's configuration. I.D. 85, 141–42, 145, 147.

There are additional major differences between the OE and replacement markets for these products. To supply the OE market, a manufacturer need only be able to manufacture a limited line to fit contracted-for applications, I.D. 67, 126–27, while a replacement market supplier must produce a broad line of types and sizes to fit a very high percentage of all vehicles on the road. I.D. 87–88, 144. In the case of shock absorbers, thousands of different part numbers are produced by a single manufacturer. Monroe, for example, boasts having over 5,000 part numbers for the domestic market alone. CX 143L, I.D. 226. These variables cause differences in the production methods and machinery used in the OE and replacement markets.[6] The OE supplier needs but one plant and little warehouse space or inventory to supply a vehicle manufacturer, and geographical proximity to the vehicle assembly plant is important. I.D. 78–79, 137–38. A replacement market supplier, on the other hand, needs [7] warehouse facilities, a large inventory and distribution lines across the country. I.D. 124, 153–54. *See also,* CX 5W, 5Z–8 to 9. The replacement supplier must also label and package his product, while

[6] In OE shock absorber production, suppliers must use high speed production lines to meet the volume demanded by manufacturers at competitive costs. Supplying the shock absorber replacement market, however, requires a mix of high and low-speed production facilities to maintain inventory in the broad array of sizes and design needed for vehicles in use. In addition, the OE market for shock absorbers is typically limited to one size and design, the 1" diameter conventional shock absorber, while manufacture for the replacement market demands a variety of sizes and design features for each application, *e.g.*, 1", 1-3/16" and 1-3/8" sizes and conventional, spring and air-assisted designs. Of these, the 1-3/16" size is the most popular. I.D. 65, 75–77, 86–89, 101–03, 106–09.

OE product is simply shipped in bulk, without even mounting parts. I.D. 66, 90, 111, 130, 148, 152.

A further significant distinction between these markets lies in methods of sales and marketing. In the OE markets, sales of both ESP and shock absorbers are made by bidding on specifications provided by the vehicle manufacturer; advertising and other product promotions play no part. I.D. 69, 72, 122, 131–36. The OE sales force, moreover, is small and has a technical, engineering orientation to deal effectively with similarly oriented OE buyers. I.D. 71, 132. In the replacement markets, however, marketing and product promotion are important considerations. Replacement market manufacturers advertise heavily to develop brand name recognition and consumer demand for their product. Promotional efforts are also aimed at warehouse distributors and jobbers, to build brand loyalty and create incentives for their sales efforts. I.D. 91–97, 149, 152.

Demand for both shock absorbers and ESP also varies substantially between the respective OE and replacement markets. Demand in the former markets is strictly a function of new vehicle production, while demand in the latter markets is dependent upon the number of vehicles in use, their age and mileage. I.D. 64, 84, 125, 140. There is no cross-elasticity of demand between the markets. I.D. 63, 118.

Given this multitude of factors distinguishing these OE and replacement markets, it is not surprising that the industry itself regards the markets as separate and categorizes sales accordingly. I.D. 59–61, 120–21. [8]

These "practical indicia" differentiating OE sales from replacement sales in both the ESP and shock absorber product markets amply satisfy the criteria for economically meaningful submarkets set forth in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

The ALJ found additional submarkets within the replacement market: an "OE service" submarket and an "independent aftermarket" submarket. OE service is defined as parts purchased by the vehicle manufacturer for resale by its dealerships as replacement parts. The independent aftermarket includes all other replacement sales, *e.g.,* to warehouse distributors, mass merchants, and chains of franchised specialty installers. I.D. 170.

A number of the same *Brown Shoe* criteria which distinguish OE from replacement sales also distinguish OE service transactions from those of the independent aftermarket. For example, sales in the OE service submarket are made by the same small, technically oriented sales forces used in OE sales. Similarly, widespread warehouse facilities are unnecessary for OE service sales; delivery is made to the vehicle manufacturer which redistributes to its dealers.

I.D. 174, 178. A manufacturer can compete for OE service business without manufacturing a full line of replacement parts, while broad coverage is needed in the independent aftermarket. I.D. 180. Finally, industry members and trade publications recognize OE service as a distinct market, reporting sales in it separately from the independent aftermarket. I.D. 171–73. Given these factors, we agree with the ALJ's finding of these two economically significant submarkets within [9]the replacement market.[7] [10]

Moreover, the ALJ correctly grouped replacement steering dampers, conventional shock absorbers and McPherson struts within the replacement shock absorber market. These items are all produced by the leading shock absorber manufacturers as the items which comprise a complete line of replacement shock absorbers. They are designed by the same engineering staffs within each company, and, as discussed above, share a common technology. They are marketed together through the same distribution channels to the same customers. I.D. 37, 46, 50, 51, 53, pp. 110–11. Ample precedent supports viewing such closely related products as a relevant market for antitrust purposes. *E.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 356 (1963); *A.G. Spalding & Bros., Inc.,* 56 F.T.C. 1125, 1160 (1960), *aff'd* 301 F.2d 585, 606 (3d Cir. 1962).

The ALJ found that the relevant geographic market for both products to be the United States as a whole. I.D. 24. The parties do not contest this finding. *See, e.g.,* RPF, n.6. We concur with the ALJ

[7] Respondent urges that only overall product markets may properly be found, relying on an asserted high cross-elasticity of supply between OE and replacement market production. The ALJ, however, was correct in rejecting this contention. Even assuming, *arguendo,* that great flexibility exists between OE and replacement market production, other economically significant distinctions between them remain. *See, Brown Shoe Co.* v. *U.S., supra,* 370 U.S. at 325. For example, an established OE shock absorber manufacturer would lack brand name acceptance, an appropriate sales force, warehousing, and the diverse and sizeable inventory needed to obtain replacement market sales. *See* discussion pp. 10–11, *infra.* Factors such as these are important obstacles to entry into the automotive aftermarket, and are well recognized in prior decisions. *See, Ford Motor Co.* v. *United States,* 405 U.S. 562, 565–67 (1972) (spark plugs); *Bendix Corp.* v. *FTC,* 450 F.2d 534, 537 (6th Cir. 1971) (filters) (reversing on other grounds); *SKF Industries, Inc.,* 94 F.T.C. 6, 14 n.2, 78 (1979) (ball bearings). *See also, United States* v. *Aluminum Co. of America,* 377 U.S. 271, 277, 285 (1964); *United States* v. *Black & Decker Mfg. Co.,* 430 F.Supp. 729, 736–41 (D. Md. 1976). *Compare, Budd Company,* 86 F.T.C. 518, 572 ("The interchangeability of production *and distribution facilities* between two products [is important in market definition] since the manufacturer of one can shift readily to the production *and sale* of the other . . .") (*emphasis supplied*). Finally, there is considerable evidence that the cross-elasticity in question is substantially lower than respondent contends. The record reveals numerous factors impeding cross-elasticity: some replacement production is done most efficiently in small batches on low speed, less automated assembly lines ("short lines"), while OE production is best done in larger batches on high speed lines ("long lines"). I.D. 101–03, 106–07, 109. Factors such as lead time to win contracts and the need to maintain on-going relationships with customers prevent abrupt switching between OE and replacement production, absent substantial excess capacity. I.D. 112–14. Finally, it is more efficient to specialize plant production according to product size and Monroe has moved to such specialization. I.D. 110, 116. OE and replacement shock absorbers are typically 1" and 1-$^{3}/_{16}$" respectively. I.D. 65, 89.

Respondent also urges that OE sales must be included within the relevant market based on the assertion that entry into the replacement market cannot occur without the aid of additional volume from OE sales, and the further assertion that a "submarket must support new entry on an economically viable basis." RAB 44. Whatever the merit of the latter proposition as a matter of law, respondent's factual predicate is incorrect. *See* discussion *infra,* 59.

that this is the appropriate geographic market in which to analyze the effects of the acquisition.

Market Structure

Examining either the overall replacement market for shock absorbers or the submarket comprised of the independent aftermarket, one finds a substantial sales volume concentrated among very few firms. In the overall replacement market, sales by manufacturers totaled $250 million in 1975 and $290 million in 1976. I.D. 183. Four-firm concentration is extremely high in this market; the top four firms accounted for 91.4 percent of replacement market sales in 1975 and 92.9 percent in 1976. I.D. 185. Two-firm concentration is also extraordinarily high, the top two firms enjoying 77.6 percent of the replacement market in 1976. *Id.* [11]

Monroe is the number two firm in the overall replacement market, a close second to Maremont. I.D. 185, 195. The remaining firms in the top four are Questor and General Motors, which sells under the Delco brand. I.D. 184, n.77. This concentrated market structure has been stable over time; these firms have held the top four positions in this market at least since the late 1960's, and Monroe has occupied either the number one or number two position since the beginning of that decade. I.D. 188–89. There is, in addition, a trend towards increasing concentration over time. Although some existing firms have been acquired by ESP firms—a point we will return to later—there has been no new entry since at least 1958. I.D. 190. In addition, some firms have exited the market, narrowed their focus to a single product, or found themselves suffering diminishing market share as fringe firms. I.D. 191–92.

In the independent aftermarket, the market shares held by the top two and top four firms are even greater. In 1976, these shares were 80.9 percent and 90.5 percent respectively, while in 1975 they were 81.9 percent and 94.4 percent. Dollar volume of sales in the aftermarket was $235 million in 1975 and $275 million in 1976. I.D. 186. It is in this independent aftermarket where the anticompetitive consequences of the Monroe acquisition are clearest, and the aftermarket is the focus of this opinion as well. This opinion also uses the terms "aftermarket" and "replacement market" interchangeably, inasmuch as the aftermarket accounts for nearly all of overall replacement market sales, 94 to 95 percent of replacement market sales in the years cited above.

These levels of concentration are, by any measure, extraordinarily

high. Four firm market shares in the range of 50 percent [12]are sufficient to raise concern over the loss of potential competition.[8] The level of *two* firm concentration in the present case far exceeds this measure. The high two firm concentration, moreover, skews the distribution of market shares among the top four firms in a manner which further facilitates oligopolistic cooperation among the industry leaders.[9]

Very substantial barriers to entry, especially into the independent aftermarket, accompany these high levels of concentration. The scale economies involved in the production of shock absorbers impose a high barrier to entry. A minimum efficient scale (MES) shock absorber plant would have capacity to produce over 6 million units annually, a volume which would comprise approximately 10 percent of annual unit sales in the replacement market, Tr. 9914, RX 230, I.D. 222. Barriers of a different sort are found in the time and technology required to establish a manufacturing facility, and the time needed to garner a necessary market share. Acquiring design skills and manufacturing know-how present real but surmountable obstacles, as existing producers can and do provide licenses and manufacturing technology. *See* discussion *infra*, 57–58. A manufacturing plant can be constructed in under two years, I.D. 224, but gaining significant market share would obviously extend considerably beyond that time frame. [13]

Additional major obstacles surround the independent aftermarket, and involve many of the same factors previously considered in distinguishing the relevant product markets. Some of these factors include the need to establish a large nationwide sales force, relationships with buyers, advertising and other promotional efforts geared to consumers, retailers and jobbers, and ultimate acceptance of the new entrant's brand. Tr. 10193, I.D. 225, 233–41. Existing firms have established high levels of product differentiation, and continue to advertise extensively to consumers. I.D. 237–40. A successful new entrant into the aftermarket must also create a national distributional network, including very substantial investments in warehouses and inventory. As discussed above, an invento-

[8] In *Heublein, Inc., supra*, we held that a four firm ratio of 47.9 percent "arguably falls at the edge of a reasonable definition of those markets where the loss through merger of a potential entrant may substantially lessen future competition." 96 F.T.C. at 584–85. *See also, United States* v. *Phillips Petroleum Co.*, 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974) (four firm ratio of 58 percent is concentrated); *United States* v. *Wilson Sporting Goods Co.*, 288 F.Supp. 543 (N.D. Ill. 1968) (four firm ratio of 63 percent is concentrated). *Cf. United States* v. *Hughes Tool Co.*, 415 F.Supp. 637 (C.D. Colo. 1976) (four firm ratio of 34 percent not concentrated).

[9] An examination of the distribution of market share has been used increasingly to weigh the likely competitive impact of a given level of concentration. *See, e.g., Heublein, Inc., supra*, at 584–85 (a "high two firm ratio of 41.9 percent" was considered sufficient to invoke Section 7, although the four firm ratio of 47.9 percent was otherwise borderline); *Warner Lambert Co.*, 87 F.T.C. 812, 870 (1976). *See also*, Kwoka, *The Effect of Market Share Distribution on Industry Performance*, 61 Review of Economics and Statistics 101 (1979).

ry of replacement shock absorbers involves thousands of different parts, and sufficient numbers of each must be warehoused to provide a high rate of order fill. I.D. 225–26. A new entrant in the aftermarket would also face the expense of "stock lifting," buying out the existing stock of a warehouse distributor or jobber, and other promotional costs in order to gain entry into the existing distributional network. *See* CX 4"O", I.D. 227. Further demands upon the new entrant are the need to offer credit terms and other financial assistance to new accounts. I.D. 228–29.

These barriers to entry are consistent with the high level of concentration found in the replacement market, and with the trend towards still greater concentration. Moreover, the existence of substantial barriers at both the manufacturing and distributional levels operates as a two-edged sword, keeping out both foreign shock absorber manufacturers and domestic manufacturers of other automotive replacement parts. *See* discussion *infra,* 40–43.

High levels of concentration, of course, are not to be analyzed in a rigid, mechanical fashion, causing an inevitable conclusion of poor competitive performance. Concentration ratios do, however, raise a serious concern that the market performs in a noncompetitive fashion, which may be rebutted by proof of competitive market performance. *United States* v. *Marine Bancorporation, Inc., supra,* 418 U.S. at 630–31. *See also, United States* v. *General Dynamics Corp.,* 415 U.S. 486, 494–504 (1974); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 176–77 (1964). Respondent argues strenuously that the performance of this market did become fiercely competitive in the years just prior to the merger. RAB 46–60. We, too, find that economic performance in this market improved substantially in those years, but, as we will discuss below, we disagree with respondent over the cause of that new competitive vigor. In brief, we find that the source of the improved economic performance lay in **[14]**industry fears that Tenneco was likely to attempt entry—an actual "edge effect"—rather than in the buyer power supposedly asserted by mass merchants against their suppliers. *See* discussion, *infra,* 30, 52–57. An edge effect, of course, can be expected to continue only so long as there are firms to be feared at the edge, and the elimination of Tenneco as a potential entrant thus reduces the probability that the increased competition and resultant lowered profitability in the premerger period will continue. In other words, absent the salutary impact of a Tenneco at the edge, it is highly probable that the oligopolistic cooperation which is to be expected in concentrated markets will soon reemerge. Thus, continued reliance upon high concentration ratios is appropriate where an

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actual edge effect is found, as those ratios indicate the ease with which oligopolistic cooperation can be expected to resume in the post-merger period.

We turn, then, to those factors which establish Tenneco as a likely potential entrant into the replacement shock absorber market. This entails an examination of Tenneco's capability, interest and incentive to enter this market.[10] As we have indicated, these factors must be present for Tenneco to be considered either an actual or perceived potential entrant, so we will discuss them but once and in the context of the perceived case.[11] **[15]**

Capabilities

Tenneco was uniquely capable of *de novo* entry into the replacement shock absorber market. As discussed above, its Walker Manufacturing Division already manufactured rolled and welded steel tubing for ESP production, tubing which is also a major input in shock absorber manufacture. I.D. 270–71. There is little doubt that Tenneco possessed substantial existing capability in terms of tube production know-how and manufacturing equipment; the firm was regarded as a very efficient ESP manufacturer. *See* discussion, *infra*, 45, n.41. Tenneco gave great weight to this common factor of production in the premerger period, and found its existing skills in ESP manufacturing were highly relevant to shock absorber production.[12] **[16]**Tenneco's Walker subsidiary provided additional design and manufacturing skills relevant to shock absorber manufacture; Walker is a major manufacturer of hydraulic and air-powered jacks which rely on hydraulic principles and internal construction closely related to the internal design and construction of shock absorbers.

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[10] *British Oxygen Co.*, 86 F.T.C. 1241, 1251–56 (1975), *rev'd and remanded on other grounds sub nom., BOC Int'l. Ltd.*, 557 F.2d 24 (2d Cir. 1977); J.F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 Yale L.J. 1, 23 (1977). Other decisions have used differing terminology to describe the same inquiry, *e.g., United States* v. *Marine Bancorporation, supra*, at 624 (characteristics, capability and economic incentive); *United States* v. *Phillips Petroleum Co., supra*, at 1239–53 (capability, motivation and interest).

[11] Generally, this organization poses no problems, as much of the evidence of interest, capability and incentive bears equally on each theory. At some points, however, this is not so, given the differing viewpoints of the two theories, *i.e.*, what the firm is likely to do versus what other firms are likely to see it as likely to do. These points will be discussed as they arise.

[12] Respondent's position in this litigation has been to diminish the significance of its ESP production, *see, e.g.*, RAB 20–21, but its view before the acquisition was to the contrary. According to Tenneco's Corporate Development Department,

> [t]he manufacturing process for exhaust and shocks are very similar, with both products starting from sheet steel that is welded into tubing. This probably is the most important common manufacturing process and one in which Walker has a great deal of proprietary knowledge. Other metal components are fabricated by machining, forming or shaping, and are assembled or attached together. The exhaust systems probably require more forming and welding, whereas the shock requires more machining, some wire processing, and some hydraulic work. Regardless of the detail process, both products are metal fabricated products with very similar technology and production skill requirements. CX 4F.

See also, I.D. 269, 273–75. *Cf.*, I.D. 276.

I.D. 346. For example, both hydraulic jacks and shock absorbers contain piston rods, rubber seals, springs, bearings, check valves, screw machine parts, machine rods, chrome plated parts, and hydraulic fluid. I.D. 348–49. Further similarities exist for the engineering and research and development skills required for both jacks and shock absorbers. I.D. 347, 350. These similarities were not lost on Tenneco, at least prior to the Monroe acquisition, when it considered its jack capabilities transferable to shock absorber production.[13]

In distribution and marketing, as well as in manufacturing, Tenneco was extremely well-positioned to enter the shock absorber aftermarket. In addition to its 8 manufacturing plants, it had 2 distribution centers and 22 field warehouses nationwide in 1975. I.D. 9–10. This network was well suited to distribute shock absorbers along with ESP, *see,* I.D. 287, and promised synergy savings from joint distribution. In the warehouse, for example, both mufflers and shock absorbers are stored and moved in "cubes" of packages stacked on pallets. I.D. 286. *See also,* I.D. 290. In shipping, heavy but compact shock absorbers combine well with bulky but light ESP, allowing optimum use of trailer space and weight limits. I.D. 291. These theoretical freight savings may be realized, moreover, given that shock absorbers and ESP move in the same distribution channels to the same customers. I.D. 278–81, 296–97. *Cf.,* I.D. 282–84. For example, at the retail level, muffler specialty chains nearly always offer shock absorbers as a second line of merchandise, I.D. 280, but only occasionally offer other types of automotive repair.[14] I.D. 307, 309, 311–16, 318. **[17]**

Other segments at the retail level also offer both shock absorber and ESP service, including service stations, mass merchandiser automotive centers, and other repair garages. I.D. 303–04. Some of these retail segments, particularly mass merchandisers and muffler specialty shops, are supplied directly by the manufacturer, and an account may be handled by a single sales force. I.D. 292–93, 302. At the wholesale level, WDs also handle both ESP and shock absorbers, creating further opportunities for combined shipments. I.D. 290, 297–98. In addition, those accounts, too, may be handled by a unified sales force, although the record on the success of this practice with

[13] As with ESP, respondent in this proceeding has attempted to diminish the significance of its jack manufacturing capabilities. RAB 25–26. Nonetheless, its internal, pre-merger memoranda paint a remarkably different picture. *See, e.g.,* CX 5Y–Z–1, CX 15J. Such pre-acquisition statements are inherently more reliable than views proffered in defense of a merger.

[14] The record explains in great detail why this is so. Briefly, both shock absorbers and ESP are "under-the-car" items requiring the same type of tools and shop configuration to service. Both jobs require little skill, allowing the shop to employ low paid installers who lack the training or ability to perform other, more complex types of repairs, *e.g.,* transmission, brake or tuneup services. I.D. 304. *See also, e.g.,* I.D. 317.

WDs is mixed. I.D. 300. Compatability in marketing is also seen in the use of the same trade journals to promote both ESP and shock absorbers. I.D. 299.

Further, the same factors are important in both shock absorbers and ESP in gaining and keeping wholesale accounts, *e.g.*, the inventory management necessary to provide a high level of "order fill," *see* discussion *infra*, 52, 54–55, the financial resources to provide credit terms, and the salesmanship necessary to cultivate accounts. I.D. 298.

Determining the compatability between different product lines, and thus the probability of entry, need not be limited to an examination of only the individual factors set forth above; past decisions by other firms in these industries provide such a useful check on our findings. Here, two separate lines of historical data point to the compatibility of Tenneco's operations to the replacement shock absorber market.

First is the prior merger of *every other* major ESP firm with a replacement shock absorber manufacturer. Thus, Maremont, originally only an ESP manufacturer, acquired the Gabriel Company in 1960, I.D. 322, and then successfully expanded Gabriel's share of the shock absorber replacement market. *See generally*, I.D. 322–29. Maremont is now the leading manufacturer in the shock absorber replacement market. I.D. 326. At about the same time the predecessor of Questor Corporation, AP Parts Corporation, another ESP firm, acquired Heckethorne, a struggling shock absorber firm. I.D. 331–33. Again, the combined venture successfully expanded its share of the shock absorber replacement market. I.D. 334. The records established by these firms corroborate the compatibility in design and engineering outlined above; both firms successfully applied their skills in ESP engineering and manufacturing to the redesign of their shock absorber product line. *See* discussion *infra*, 62–64. The compatibility in distribution and marketing is further corroborated by the [18]behavior of smaller ESP manufacturers, which distribute shock absorbers as reboxers.[15]

Another line of historical evidence also points to the compatibility of Tenneco's pre-merger product line with entry into shock absorber manufacture. That product line included air and hydraulic-powered automotive jacks which, as discussed above, have much in common with shock absorbers in terms of engineering and construction. The significance of these similarities is borne out in practice; the record

[15] The remaining firms in the replacement ESP market, Arvin and Midas, distribute reboxed shock absorbers, I.D. 335–37, and Midas has considered entering into shock absorber manufacture from time to time. *See* discussion, *infra*, 44.

reveals that several shock absorber manufacturers also manufacture hydraulic jack products. These firms are Armstrong, a British corporation, and Bilstein and Fichtel & Sachs, which are German companies. I.D. 352.[16] [19]

Additional Capabilities

Although the combination of objective factors and observed entry provide ample reason to find Tenneco capable of *de novo* or toehold entry into shock absorber production, Tenneco had additional attributes which would have assisted such entry. These include Tenneco's ownership via previous acquisition of Triple S Industries (a "manufacturer" of steering dampers), its ownership of a subsidiary manufacturing oil seals, and its planned expansion of its "Speedy Muffler King" franchise of muffler specialty shops.

Speedy Muffler King, originally limited to Canadian operations, was being expanded into the United States at the time of trial. While relatively few Speedy shops had by then been opened in the U.S., I.D. 313, Tenneco intended to expand the chain to national proportions, CX 27L, 500 shops within five years.[17] Tr. 1651–52 *in camera.*[18] *See also,* I.D. 310–13. There is little reason to doubt that these plans will

[16] Such evidence, when available, has repeatedly been used by courts weighing the probability that future business conduct will take a particular course. Thus, in *United States* v. *Black & Decker Mfg. Co., supra,* the Court examined the capability of Black & Decker, a manufacturer of electric-powered hand tools, to enter *de novo* the two cycle gasoline-powered chain saw market by the objective factors of engineering, manufacturing, marketing and distribution compatibilities, but also gave considerable weight in its finding of non-compatibility to the fact that no successful entry had ever occurred from the supposedly adjacent market into the target market. *Id.* at 758. The Court went on to note that a manufacturer with great familiarity with four-cycle gasoline engines had tried unsuccessfully to enter through a toehold acquisition the two-cycle gasoline engine-powered chain saw market. *Id.* at 773. The Court also observed that recent entrants had been foreign firms which already had considerable expertise in two-cycle engines. *Id.* Similarly, in *United States* v. *Phillips Petroleum, supra,* the Court looked to the *de novo* entry by another firm into the California petroleum market to corroborate objective factors pointing towards the feasibility of a similar entry by Phillips, and to rebut Phillips' contention that unique factors in the California market precluded its entry by means other than through acquisition. 367 F.Supp. 1226, 1247–49. *See also, United States* v. *Consolidated Foods Corp.,* 455 F.Supp. 108 (E.D. Pa. 1978), in which the Court found that the acquiring firm's Sara Lee division was not a likely *de novo* entrant into the institutional frozen pie market, given that its past efforts at *de novo* entry failed due to an inability to master the requisite "technology," specifically, manufacturing the pie crust. *Id.* at 139. .

[17] Tenneco's internal plans to expand its muffler shop chain do not, of course, bear directly on its status as a perceived potential entrant, absent some indication that those plans had become known to target market firms. On the other hand, its ownership of the then small Speedy Muffler King chain was, of course, public knowledge, and target market firms could reasonably expect Tenneco not to remain content with a relative handful of muffler shops, given the rapid growth of this segment of the replacement ESP market.

[18] This opinion makes limited disclosure of relevant and material *in camera* information beyond that already utilized by the ALJ in his Initial Decision. Commission authority to make such disclosures is specifically reserved by Section 21(d) of the Federal Trade Commission Act, 15 U.S.C. 57b–z (d) and Section 3.45(a) of the Commission's Rules of Practice, 16 C.F.R. 3.45(a). Such disclosure is made in order that the Commission's decision-making be "on the record" to the greatest extent possible, to aid the public's evaluation of the wisdom and fairness of Commission decisions, and to provide clearer guidance to affected parties. Balanced against these factors is the potential harm disclosure could cause to the party previously protected by an *in camera* order. *See RSR Corp.,* 88 F.T.C. 734 (1976). Here, we believe the risk of such harm is slight given both the age of the data (generally now three to five years old) and the circumscribed nature of the disclosures that are made. In these circumstances, we believe that the public interest in providing the full factual underpinnings of our decisions must prevail.

be realized. Retail muffler shops are the fastest growing segment of the replacement market, I.D. 306, making it very desirable for a major ESP manufacturer such as Tenneco/Walker to be assured of a significant share in that segment. Moreover, the feasibility of vertical integration in that segment is demonstrated by the strong position of the Midas chain, which manufactures its own line of ESP. *See,* I.D. 314, 207 and n.90.

Tenneco's plans further show an intention to install shock absorbers as the only other major line of merchandise in its muffler shop chain, I.D. 309, 313, as is the common practice in muffler specialty operations, I.D. 307. Although Tenneco forecast that its chain would achieve the majority of its sales in mufflers, it also foresaw substantial shock absorber sales; at trial, the president of Walker Automotive testified that within "several years" its muffler shop chain could achieve a shock absorber sales volume comparable to the level Monroe supplied to Midas—$7 to $8 million annually, Tr. 1669, a level which corresponds to roughly 1.5 million units annually. Tr. 1267 *in camera,* 10186–87. The reliability of this forecast is [20]enhanced by its consistency with the actual experience of existing muffler shop operations. *See, e.g.,* I.D. 312, 315–16, 318.

The operation of a major chain of muffler shops would be of significant assistance to entry into shock absorber manufacture. As discussed above, the minimum efficient scale of a shock absorber plant is in the neighborhood of 6 million units annually. *Supra,* 12. Thus, Midas' volume at the time of trial, while insufficient on its own to merit in-house manufacture,[19] would be of considerable help in achieving volume sufficient to support a MES plant.

Tenneco's acquisition of Triple S Industries in 1974, I.D. 379, further enhanced its capabilities to enter the shock absorber market. Triple S produced and distributed a line of steering dampers and other automotive accessories, *see, e.g.,* I.D. 369, 380, and was regarded in the industry as a manufacturer of steering dampers, I.D. 383–84. It should be noted, however, that Triple S performed substantially less than all the operations normally considered as part of the manufacturing process. Although it did draw up specifications and reviewed and modified the design of its steering

[19] A witness from Midas addressed this point directly, testifying that Midas looked from time to time at the feasibility of entering shock absorber production, but found that its internal demand for shock absorbers was insufficient to justify production. Tr. 1255 *in camera.* (Almost all of Midas' shock absorber purchases were distributed to its muffler shops; very few reboxed shock absorbers were resold to wholesalers. Tr. 1283–84) Additional factors inhibiting in-house manufacture of shock absorbers were that Midas had not yet accomplished complete in-house ESP manufacture and lacked certain areas of shock absorber engineering unrelated to ESP production. Tr. 1288–90. Tenneco, of course, was not so narrowly circumscribed in either its sales opportunities or its engineering capabilities.

damper cylinders, and did attach installation bracketry to finished cylinders, I.D. 382, Triple S did not actually produce the cylinders themselves. Rather, cylinder production was contracted out to a shock absorber manufacturer, Maremont at the time of the Triple S acquisition. I.D. 381. Despite this important lack of manufacturing [21]capacity,[20] Triple S still contributed to Tenneco's capabilities to enter shock absorber manufacture. Triple S possessed more than familiarity with shock absorber specifications; its president, Mr. Petrak, had created and patented a new shock absorber design—the "Terramatic"—which promised several improvements over conventional shock absorber designs. I.D. 371. One such improvement would be an ability to consolidate replacement parts numbers, *id.*, which could save significantly on inventory expense both to the manufacturer and its customers. This design feature would thus be of obvious import to a new entrant by reducing two major barriers to entry: the capital cost and product differentiation barriers.

Respondent disputes the value of the Terramatic design, arguing that its patents were "narrow," that its ability to be manufactured successfully was uncertain, and that Mr. Petrak's talents lay more in sales than engineering. *See, e.g.*, RAB 3–4. Respondent further asserts that it instructed its negotiators not to pay additionally for the Terramatic patent when purchasing Triple S Industries. *Id.* [22]

Nonetheless, the record demonstrates that respondent considered the Triple S acquisition as adding to its potential to enter the shock absorber market before it acquired Monroe. For example, Tenneco/Walker's 1977–81 Five-Year Plan stated:

> During 1976, we will be working on a new concept in shock absorption called Terramatic. The Terramatic unit, which is patented, came to Mechanex through the purchase of Triple S Industries in 1974. If the Terramatic principle proves successful, it could be extended to automotive and heavy duty shock absorbers, opening up a tremendous new market for Mechanex. (CX 25Z–9)

Our conclusion that respondent's capability to enter shock absorber production was enhanced by its acquisition of Triple S, Mr.

[20] It is for this lack of manufacturing capability combined with the extremely small share of the shock absorber market held by Triple S (between .1 and .3 percent) that we dismiss complaint counsel's appeal that the Monroe acquisition should be viewed as a merger between actual competitors. While an assembler of components may be considered a "manufacturer in the proper circumstance," *Beatrice Foods Co.*, 86 F.T.C. 1, 71 (1975), and the appropriate line between an assembler/manufacturer and a reboxer is not always crystal clear, we find Triple S's operation closer to the latter rather than the former. Triple S's ability to expand sales, or to move into conventional shock absorbers was obviously dependent upon the willingness of another manufacturer to supply completed shock absorber cylinders at a competitive price. Thus, a move by Triple S into conventional shock absorber sales would be obviously limited to that of a reboxer, absent the construction of a plant to manufacture the shock absorber cylinder—in essence an entry *de novo*.

For these reasons, we find that Tenneco's prior acquisition of Triple S is best viewed as an addition to its design and engineering abilities to enter *de novo* rather than as the acquisition of a manufacturer with existing ability to compete in the shock absorber replacement market.

Petrak's services, and the Terramatic design is not diminished by the fact that design and testing work lay ahead on the Terramatic shock absorber. I.D. 372, Tr. 2088–90.

Tenneco's capability to enter shock absorber manufacture was further enhanced by its existing production of hydraulic seals, I.D. 353, a necessary component in shock absorber production. Tenneco would have an information advantage over other firms from possessing this additional area of manufacturing expertise, *see, e.g.*, I.D. 353, even granting Tenneco's assertion that its oil seal products were not then suitable for use in shock absorber manufacture.

Significantly, there is no indication that firms in the shock absorber market were aware, or had any reason to be aware, of Tenneco's doubts as to its ability to produce oil seals suitable for shock absorbers, or of the technical problems which remained to be overcome with respect to the Terramatic shock absorber. [23]

A final area of additional Tenneco capability, and by no means an unimportant one, is the great financial resources Tenneco could bring to bear on an entry into shock absorber manufacture. As discussed above, Tenneco was, at the time it acquired Monroe, the 15th largest industrial corporation in the United States in terms of assets and 18th largest in terms of net income. Its 1975 net income was $343 million. I.D. 3. Such resources enabled Tenneco to overcome the significant financial barriers to entry into shock absorber manufacture, whether *de novo* or through toehold acquisition, as well as to implement its complementary expansion into retail muffler shops, *supra*, 19. This financial capability increased Tenneco's ability to turn even a relatively undesirable toehold firm into a significant competitor.[21]

Incentive

Tenneco had substantial incentives as well as capabilities to enter into shock absorber manufacture. Indeed, as we will discuss, there is a close interrelationship between these elements; its capabilities would provide Tenneco with special economic advantages as a shock absorber manufacturer.

Synergy savings from joint ESP/shock absorber manufacture and

[21] For example, Mr. Baker of Arvin Industries, a minor ESP manufacturer which distributes but does not manufacture shock absorbers, discussed the relative abilities of Arvin and Tenneco to turn around Blackstone, a toehold firm which Arvin found unattractive:

> We turned [Blackstone] down for basically that reason: they were a poor competitor in that marketplace. We didn't have the horsepower to improve their market position . . . Walker, with their number one position in ESP and with their financial wherewithal, could take a Blackstone and do wonders with it. They certainly could move a Blackstone off of an eighth or tenth list and move it right up through the pack somewhere. Tr. 601–602.

distribution are good examples. Synergy was discussed above as it related to Tenneco's *ability* to enter the shock absorber market, but these special savings also provide economic incentives not available to other industrial enterprises. The record in this matter is unusually clear on the areas where synergy savings exist between the ESP and shock absorber markets and the magnitude of those savings as well. [24]

Perhaps the best expression of these synergies is found in CX 5, an internal Tenneco document entitled "Proposal to Acquire Monroe Auto Equipment Company." This proposal, prepared by Walker for top Tenneco management, sets forth a number of areas of projected savings. The proposal discusses in particular the savings to both Walker and Monroe from joint shipments of shock absorbers and ESP, which would reduce the freight bill for shock absorbers alone by $500,000 per annum. CX 5V–Y, Z–22. These combined shipments would produce additional advantages to customers[22] which would in turn increase profitability and market share in both the ESP and shock absorber markets. It predicted that Walker ESP would gain 1 percent in the traditional aftermarket and 3 percent in the non-traditional aftermarket, while Monroe would gain 2 percent and 6 percent in each market respectively. CX 5R, X–Y. Walker also foresaw substantial synergy savings from consolidation of research and development, purchasing, manufacturing and warehousing. These savings were set forth in its Monroe proposal.[23] [25]

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[22] For example, an ability to combine shipments would allow customers to place orders more frequently, since a smaller volume of each product could be combined to fill a trailer. More frequent ordering would allow a customer to reduce its inventory, increasing its profitability by increasing the turnover on both product lines. Walker foresaw that this improvement in service to its customers would increase the market share of both its ESP line and the Monroe shock absorber line. CX 5R, X–Y.

[23] *Operations*

Monroe presently has approximately 100,000 square feet in each of their three plants devoted to storage and shipping. This represents approximately one-third of their domestic floor space. We project we could warehouse and ship for them all of their product, thereby freeing up the equivalent of a new plant in terms of space. To accomplish this, we would add approximately 25,000 feet to each of three of our distribution points, for a cost of less than $1,500,000.

Not only would there be substantial savings of floor space, but a very significant better utilization of fixed investment in each of their existing plants. Many pieces of equipment they presently have in each plant, such as steel slitters, tube mills, etc., as well as support functions, such as plant management, personnel, maintenance department, etc., would not have to be duplicated—which would be the case if they had to build a new plant. Monroe estimates the result would be that they could obtain additional shock production through increased efficiency in addition to an equivalent new plant in production capacity. The manufacturing process for exhaust and shocks are very similar, with both products starting from sheet steel that is welded into tubing. Monroe has a steel slitting operation in each plant, whereas Walker contracts this operation on the outside. Walker's expertise in hydraulics, with our jack operations, also ties in closely with Monroe's.

Purchasing

Savings can be realized by combining this function, particularly since commodities purchased are basically the same, being primarily steel, cartons, oil, and rubber. Possibilities exist for other Tenneco divisions to increase their sales volumes. The combination of these savings should have a profit contribution of a minimum of $600,000 annually by 1980.

Engineering and R & D

Here again the potentials for savings are significant due to the similarity of the product lines. Present research on materials is being duplicated, as well as our hydraulics research. Walker exhaust systems research

(Continued)

Respondent urges that these synergy savings are largely unique to a Monroe-Walker merger, not to generally realizable savings between ESP and shock absorbers. RAB 24–25. While there are, obviously, some areas in which Tenneco expected to gain from a melding of specific strengths from the two firms, such as the discussion of Monroe's "historic strength in promotion," *infra,* 27 n.23, the great bulk of the projected savings are plainly due to the nature of the products rather than the [26]particular companies producing them. Moreover, even a projected major savings which at first blush seems unique to Monroe, the gains from better utilization of Monroe factory space, appears upon examination generally applicable to joint ESP and shock absorber production. That is, Tenneco believed that it could increase the effective capacity of Monroe's plants by storing shock absorber inventory in Walker warehouses, freeing Monroe [27]plant space for maximum production. We fail to see, however, why this gain from efficient use of warehouse and plant space would not also occur if Tenneco had acquired a toehold producer or entered *de novo.*

Synergy savings alone, of course, could be insufficient inducement to enter a declining market, and respondent urges that the shock absorber market is, in fact, in decline, eclipsed by the rise of MacPherson strut suspension systems, RAB, 10–11. We disagree with respondent's contention on this score with respect to both the

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utilizes dynamics of sound dampening, which is quite similar to the theory of motion vibration dampening utilized in shock absorber research. In both Walker's air jacks and Monroe's air shocks, the products require combined application of hydraulic and air principles.

Administrative

Again because of servicing the same customers and the same industry, we can expect savings in the administrative area by combining operations with Walker. The elimination of the need for a widely distributed annual report and the other expenses relevant to being a public corporation can be eliminated. These savings alone are estimated to be from $250,000 to $300,000 annually.

To this can realistically be added the savings from having several administrative departments such as credit, order entry, accounts receivable, etc., combined. These are recapped on the schedule on page 71. CX 5Y–Z–1

Finally, Tenneco foresaw significant savings from joint marketing operations:

Marketing - Domestic

Shock absorbers are distributed through exactly the same channels as exhaust, all the way from the manufacturer to the consumer. (Exhibit 1) It is the only other product which is universally installed in the muffler specialty shop. A significant reason for the compatability of the two products is that they represent "under-the-car" service items subject to the same environmental conditions and repair conditions and historically are replaced by the same person, whether he be a service station mechanic, a mass merchandiser or specialist installer, or the 'do-it-yourselfer.'

Consequently, the distribution channels are extremely similar, and Walker and Monroe have basically the same customers and prospective customers as well as competitors. This similarity of customers is demonstrated in the following Exhibit J, showing our 50 largest wholesale accounts as well as our larger non-traditional accounts. Our selling programs, discount structure, and customer terms philosophy are very similar and would be easily merged. Walker's programs stress customer service, an area in which we feel Monroe could benefit from our expertise. Conversely, Monroe has historically been an industry leader in promotion activities, an area in which Walker has been mediocre, and which becomes more important as we address our Walker programs to the consumer level. CX 5S–R (exhibits omitted).

overall growth of the market and the impact of the MacPherson strut innovation within it.

There is little doubt that the future prospects for the shock absorber market, which saw growth and high profitability during the 1960's and early 1970's, remain bright. Although 1974 saw unit sales fall, CX 5J, that sales drop was attributed to factors extraneous to the underlying strength of demand for replacement shock absorbers: a recession which delayed discretionary shock absorber replacements and the oil embargo, which closed many service stations which promoted and installed [28]shock absorbers, CX 142D, 143D. Subsequent years marked a period of recovery.[24] CX 5I–J. Respondent's own analysis of the market's future, performed just prior to the Monroe acquisition, foresaw great opportunities for growth in the years ahead:

> Monroe estimates the life of a shock to be approximately two years. With 130,000,000 vehicles on the road, and if we assume 30,000,000 are two years old or younger, we can develop the potential shock market as 100,000,000 times two (since only ½ would be replaced in any one year and there are four per vehicle), or 200,000,000 units to be replaced per year. Total replacement market sales of shocks have been 46,000,000 and 47,500,000 in 1974 and 1975 respectively, indicating that only about 25 percent of the potential market is being sold. CX 5–0.

Industry estimates foresaw steady sales increases in the long term, bolstering this current growth potential. Maremont, for example, foresaw a continued 10 percent growth rate, compounded annually, due to growth in the population of vehicles in use, increasing miles driven per year, and increases in consumer disposable income. RX 38F. Tenneco shared this view. *See, e.g.,* RX 25 at 11. This optimism was not tempered even by rising fuel prices, as analysts foresaw fuel savings coming from increased fuel efficiency in vehicles rather than a decrease in miles driven. RX 187D. Analysts also foresaw no threat to continued reliance upon the automobile as the primary means of transportation in this country, *see, e.g.,* RX 25 at 9, no substitute to shock absorbers in automobile suspensions, and no risk of reduced replacement demand from a "lifetime" shock absorber, RX 24 at 14, RX 25 at 37–38. Indeed, Tenneco itself foresaw that the trend toward smaller, lighter cars posed increased potential for the replacement market, reasoning that the ride quality of "downsized" vehicles will decrease more noticeably with degradation of shock absorber function, causing increased sales opportunities. CX 3B,I.

The advent of MacPherson strut suspensions also does not pose a

[24] Another industry member, however, did suffer reduced demand in 1977 due to an adjustment to shortened supply lines. The shortened supply lines, caused by the move to installation by mass merchandisers, require less inventory. RX 187D.

threat to overall demand for replacement shock absorbers. We do find the relevant replacement market to include [29]both conventional shock absorbers and MacPherson struts, *see* discussion *supra,* 4, 10, and respondent's own documents do not raise this distinction as a relevant factor. However, even if we remove MacPherson struts from the market, demand for conventional shock absorbers appears strong. Respondent's own witness projected that by 1983, only 35 percent of new domestic vehicles would utilize the strut layout, and these vehicles will typically have struts installed at the front wheels only; the rear wheels will continue to be controlled by conventional shock absorbers. Tr. 1952, 1967. This increased use of MacPherson struts would still leave the great bulk of replacement demand for the 130 million plus vehicles-in-use requiring conventional shock absorbers, and, as discussed above, respondent estimates that only 25 percent of this current potential market is being reached. *See, e.g.,* RX 25 at 20.

Apart from potential unit volume, respondent argues strenuously that the shock absorber industry had, by the time of the acquisition, lost the extraordinary level of profitability which had marked the 1960's and early 1970's. *See, e.g.,* RAB 10–11.

Respondent's documents reveal, however, that it believed that Monroe's profitability would return, even in the absence of a merger, to levels at least as great as those earned by Walker. CX 5Z–12, 6B. Still greater rates of profitability would arise through the synergy savings discussed above. Tenneco's pre-acquisition documents demonstrate, moreover, a belief that many of the factors which depressed Monroe's profits in 1975–76 were temporary problems, unrelated to any underlying weakness in demand for shock absorbers. Tenneco believed that Monroe's problems were due to start-up costs of new plants in Canada and Brazil, a slump in the U.S. economy, a period of excess inventory in the field (also discussed by Maremont, above) and unresponsive management by Monroe, apparently at senior levels. CX 5Z–12.

Tenneco argues that even if this were true with respect to Monroe, it does not demonstrate the overall attractiveness of the shock absorber market to an entry by means other than through acquisition of Monroe. RAB at n.11. The record, however, demonstrates that Monroe's profit history has followed the same general trend experienced by Maremont, the other major shock absorber manufacturer. Although allowing only a rough comparison, since the data for Maremont is a summary of overall operations including shock absorbers, ESP, catalytic converters, and other automotive and non-automotive items, RX 188D, the figures do show a sharp dip in

Maremont's pre-tax earnings [30](before extraordinary items) in 1974 with a strong recovery in 1975–77. RX 187M. Thus it would be unreasonable to read Tenneco's optimism over the future profitability of Monroe as limited to that firm rather than the replacement shock absorber industry generally. Moreover, this view is consistent with the prospects of continuous growth in overall demand for replacement shock absorbers and the high barriers to entry discussed above.

Another factor which contributed to the decline in profitability in the mid-1970's, and dampened prospects for a full rebound to the "Golden Age" of shock absorber profits deserves special mention, *i.e.,* the actions initiated by Maremont which increased competitiveness and reduced profit margins at the manufacturing level. Maremont made heavy investment in plant and equipment. Investment in inventory was also increased to provide an unusually high rate of "order fill." Research and development efforts were expanded to develop new shock absorber products. Finally, and perhaps most significantly, Maremont engaged in a "very aggressive" cost reduction program and passed those savings, and more, on in lower prices. Tr. 776–80, 855–57; I.D. 448–49. These aggressive activities by Maremont were additional factors depressing Monroe's profitability in the mid-1970's, Tr. 10591–91A, CX 21B, by forcing Monroe to cut prices to its traditional channel customers by 9 percent in July, 1975. Tr. 4114. Moreover, there is testimony by a witness from Armstrong, a British shock absorber manufacturer with modest sales in the United States, *see,* I.D. 393, 399, that he perceived increased competition and declining profitability among U.S. shock absorber manufacturers in the mid-1970's. Tr. 2661, 2666–68.

Although this evidence persuades us that the replacement shock absorber market did lose some of its sparkle during the mid-1970's, we are not persuaded that this dip in profitability was permanent, and, indeed, as discussed above, the indications were that the long term prospects for this industry were bright and secure. Moreover, even in an environment of normal rather than supranormal profitability, Tenneco's unique combination of capabilities made this market attractive to enter. The synergy savings which Tenneco calculated with respect to the Monroe acquisition, and which we believe are not limited to a Tenneco-Monroe combination, *see* discussion *supra,* 24–27, demonstrate the ability of those savings to enhance profitability.

Tenneco had additional incentives to enter this market, even if we assume a continuation of a "merely" normal level of profitability. In particular, Tenneco had a defensive motive [31]to enter into shock

absorber manufacture given that its major ESP competitors were already manufacturing shock absorbers. The record is quite clear that Tenneco, beginning at least from 1967, CX 77, and continuing up to the time of the merger felt at a competitive disadvantage *vis-a-vis* Maremont and Questor from the lack of a shock absorber line:

> Walker's major competitors, Maremont and Questor (AP), have shock absorber lines. In the wholesale market channel, these lines are marketed separately. In the retail market channel, Maremont and Questor tend to combine their marketing programs. We have unofficial information that Maremont will be moving to combine their shock and exhaust programs in the wholesale channel, offering combined discounts, etc. If so, we need a shock line to be in a competitive position. CX 5E.

Moreover, the most rapidly expanding segment of the independent aftermarket is the non-traditional channel composed of mass merchants and specialty installers. *See, e.g.,* RAB 54, where combined shipments are relatively more important than in the traditional channel, *e.g.,* warehouse distributors. I.D. 289, 293.

Tenneco had an additional incentive to enter shock absorber production from its planned expansion of its Canadian retail muffler chain into the United States which would generate significant demand for shock absorbers, *see* discussion *supra,* 19–20. Obtaining a source for that supply from one of its major competitors could be a costly proposition.[25]

Interest

Tenneco's interest in entry into the shock absorber market began in the late 1960's, shortly after its acquisition of Walker, and grew and quickened in the years leading up to the Monroe acquisition. The record documents that this interest was shared by officials at high levels at both Tenneco headquarters and its Walker subsidiary. Moreover, this interest was not only expressed internally through closely held planning documents but was expressed publicly as well, through negotiation with at least three major and one minor shock absorber firms and the actual acquisition of a fifth firm marginally involved in shock absorber manufacture and holding patents on a novel but untried new shock absorber design. [32]

Walker's interest in entering shock absorber manufacturing apparently began in the period 1967–68 when it commenced discussions with Armstrong Patents Ltd., the largest British manufacturer of shock absorbers. Among the possibilities set forth at the time were the purchase of shock absorbers manufactured by

[25] For a time, Monroe's ability to sell shock absorbers exceeded its plant capacity, causing it to purchase some of its supply from its competitors at a substantial premium. Tr. 1627–28.

Armstrong, perhaps at its then-operating Canadian plant, or shock absorber manufacture by Walker under license from Armstrong. The record demonstrates that, in addition to discussions and correspondence occurring between Walker and Armstrong, Walker officials were debating internally whether royalty payment could be offered, or whether Walker wouldn't be better off doing its own shock absorber engineering rather than obtaining a design through licensing, *i.e.,* entering *de novo.* CX 72–75. One scenario under consideration at that time involved Armstrong initially manufacturing for Walker and, as the volume of Walker's shock absorber sales increased, Armstrong assisting a Walker move into shock absorber manufacturing on a royalty basis. CX 76.

In weighing the import of these discussions concerning Armstrong, we find it significant that they directly involved a high Walker official, Mr. Thomas G. Cook.[26] These expressions of interest, then, are distinguished from and of considerably greater import than situations where the only interest found is at a junior or middle level of management, or even in a "think tank" office. *Cf. United States* v. *Crowell, Collier and Macmillan,* 361 F.Supp. 983, 1005 (S.D.N.Y. 1973). Moreover, the fact that initial interest in shock absorber manufacturing was expressed by an official as highly placed as Mr. Cook adds to the significance of subsequent interest shown by subordinate corporate planning offices by demonstrating that those planners were not indulging in abstract exercises unlikely to be approved by their seniors. *Cf. United States* v. *Atlantic Richfield Co.,* 549 F.2d 289, 296–97, n.9 (4th Cir. 1977); *United States* v. [33]*Siemens Corp.,* 621 F.2d 499, 503, 508 (2d Cir. 1980).[27]

One such study appears as a report by Walker Financial Planning staff dated July, 1970, and ranks growth and profitability performance in 18 lines of automotive replacement parts. Of these areas the study found:

It is observed that two product categories seem especially deserving of further market research: front suspension parts, which would include shock absorbers, and filters.

[26] At the time the 1967–68 Armstrong discussions took place, Mr. Cook appears to have been either the Walker treasurer or vice president for finance. Tr. 1573. Mr. Cook became president of Walker on January 1, 1969, shortly after these discussions ceased, and remained as president through the time of the Monroe acquisition. Mr. Cook reports directly to the Office of the President of Tenneco. Tr. 1572–73.

[27] We do not understand these decisions to mean that activity by lower level management may never be taken as sufficient indications of corporate interest. Those decisions dismissing interest shown by lower level management are clouded by objective factors which go counter to entry *de novo* or via toehold acquisition. *See, e.g., United States* v. *Siemens Corp., supra,* 621 F.2d at 503, 507–08 (firm lacked nuclear camera technology and opportunity had passed); *United States* v. *Atlantic Richfield Co., supra,* 549 F.2d at 296 (copper mining not an appropriate area for grass roots entry); *United States* v. *Crowell, Collier and Macmillan, supra,* 361 F.Supp. at 999 (reputation a high barrier to entry into musical instrument manufacturing). Here, of course, the objective evidence strongly supports the interest shown at all levels of management. *See* discussion, *supra,* 15–23.

These two categories are not only outstanding in terms of apparent profitability, but they have experienced exceptional market growth as well. CX 41F.

Another examination, prepared by Tenneco's Corporate Development Department shortly before the Monroe acquisition, discussed the shock absorber market generally as well as Monroe in particular. These Tenneco planners concurred with Walker management that Walker should move into shock absorbers, citing such factors as (1) a projected growth rate for replacement shock absorbers greater than that projected for replacement ESP, (2) an improvement in the marketing and distribution of ESP, and (3) the aid such entry would provide to Walker's move into the retail muffler shop market. CX 3B–I. [34]

Walker's 5-Year Plan, 1977–1981, also prepared prior to the Monroe acquisition, again demonstrates corporate interest in a move into shock absorbers generally, apart from an acquisition of Monroe. The plan discusses proposed development work on the Terramatic design, acquired with Triple S, as leading to a new market in "automotive and heavy duty shock absorbers" for Tenneco. CX 25Z–9.

During the period 1970–76 when these planning reports were prepared, Tenneco actively pursued various methods of entry into shock absorber manufacture. In 1973, Walker conducted negotiations with Tropic Industries, a small firm which possessed a patented new shock absorber, the "Loadamatic," with a unique ability to adjust automatically to varying vehicle loads.[28] I.D. 365–66. Walker considered various means of entering the shock absorber market with this device, including producing the device under license from Tropic, acquiring Tropic outright, and entering into a development contract with Tropic with an option to purchase the company. CX 45N–"O". Walker evinced more than a passing interest in Tropic,[29] but eventually ceased to consider it; a search revealed that the Loadamatic's patent protection was insufficient. CX 49. [35]

Walker's active and continuing interest in shock absorbers is further demonstrated by its acquisition of Triple S Industries in 1974, which, at the time of its acquisition, was marketing three types of automotive products: hydraulic stabilizers for automotive trailers, hubs for four-wheel drive vehicles, and steering stabilizers. CX 51C–E, L–"O". These items, however, were not the focus of a February 6, 1974, letter from Triple S to Walker, apparently the first contact

[28] Walker believed that this unique feature, combined with its simple design and reliability would provide a superior product to existing load-leveling shock absorbers marketed by Monroe and Maremont. CX 45A–B.

[29] This included an extensive evaluation of the current and potential market for load-leveling shock absorbers, sales forecasts, profitability calculations, charts of various expenses and sales, and, of course, profits. CX 45C–M.

between the two firms. Rather, that letter promoted Triple S's new "Terramatic" design for shock absorbers.[30] CX 52A–D.

Walker, in turn, likewise focused initially on the potential of the Terramatic principle to be incorporated in a new shock absorber.[31] [36]

That the Triple S acquisition was also justified on its existing products, CX 55A–C, 56A, and that Walker did find the Terramatic patent to be narrow, RX 8–11, do not in our view detract from Walker's interest in Triple S as demonstrating interest in entering the shock absorber market apart from the acquisition of Monroe. [37]

The acquisition of Triple S in October, 1974, has added importance beyond confirming Tenneco's internal interest in entering the shock absorber market; this acquisition must also have been taken by other industry members as tangible proof of active interest by Tenneco in shock absorbers. Significantly, knowledge of the existence of the

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[30] Among the advantages claimed for the new design over conventional shock absorbers were: (1) more sophisticated "response curves," (2) simpler design requiring fewer parts, (3) more stable performance over useful life, and (4) an adjustable feature allowing one part number to be installed in multiple applications, which would reduce inventory requirements by 60%. CX 52A–D.

[31] A February 15, 1974, Walker memo provided a preliminary evaluation of the Terramatic:

> I have no doubt that excellent working shock absorbers can be made as described. With the exception of his claims [of past testing and self-compensating ability], I do not argue with any of his presentation.
>
> The use of a variable orifice in controlling a shock absorber is not new, having been used in aircraft landing gear and flutter dampers for years. His particular construction, or method of varying the orifice, may be new.
>
> A copy of the patent was not included. I suspect his claims may be narrow . . . CX 53A–B.

A subsequent internal memorandum again demonstrates Walker's interest in entering the shock absorber market through Triple S. After discussing the current Triple S product line, it states:

> Terramatic. This is the original item which caused our interest in the company—and is the one farthest out in the time frame. Patent has been applied for and a 'couple of its features' have been tried in a Steerline unit. In my opinion, the features of this unit are technically sound—with one misgiving. Leakage path flows will be some percentage of the flow through his control configuration—I do not know what percentage. Success depends on that percentage, and the selected manufacturing process would largely determine it. No complete prototype has been built.
>
> I am enthusiastic as to the possibilities of this product, first in Steerline (particularly heavy duty) and after some manufacturing experience, very probably for heavy duty shock absorbers—and even automobile shock absorbers. I emphasize that this is not production ready. Dollars and time must be invested in development. I do feel there is reasonable chance of success.
>
> When this success is achieved, there is good opportunity (as Harry claims) for consolidation of slow movers into faster movers. There would then be definite marketing advantages as well as the technical (control) advantages he claims in his report.
>
> Overall, I believe acquiring Triple 'S' would offer Mechanex almost immediate benefit from current products. In longer range, a new shock absorber for the Walker line could be gained.
>
> Technically, current products and manufacturing are sound. The two new products appear feasible. If the 'price is right,' let's go! CX 54B–C.

Similar expressions of interest in the shock absorber market via Triple S are seen in still other Walker memoranda, *e.g.*, CX 56A ("The greatest potential, of course, which is not included in these projections, is the Terramatic principle as applied to shock absorbers."); CX 58B ("[T]his gives us just the tiniest foothold in the shock absorber industry. While we have no plans at the present time, this could be a seed that would grow . . . [Mr. Petrak] might be the one to spread the fertilizer and make the shock absorber seed bloom."); and CX 59A ("Based on the above, I believe Walker could realize sales in excess of $10 million within three years on *present* products. For Terramatic and Autolok the sales potential is so huge, particularly Terramatic, I would not want to forecast sales volume until I have had more opportunity to study the product and its markets.") (emphasis in original) *See also*, CX 25Z–9 (Walker 5-Year Plan, 1977–81).

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Terramatic design had become widespread by the time of the Triple S acquisition.[32] [38]

Thus, Tenneco's acquisition of Triple S would communicate to the "rational shock absorber manufacturer" a serious desire on the part of Tenneco to enter into shock absorber manufacture, and is therefore relevant as helping to establish Tenneco as a perceived potential entrant. This aspect is significant apart from Tenneco's internal planning[33] , or the ultimate workability of the Terramatic design. *See, United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 532–33 nn.8 and 13. [39]

Tenneco's interest in shock absorbers is also implicit in its ownership of over 70 Speedy Muffler King outlets in Canada in the early 1970's, its opening an initial outlet in the United States in 1974, Tr. 1654, 1666, and its plan to expand rapidly Speedy Muffler King into a large scale United States chain by 1983, Tr. 1651–52 *in camera.*[34] Muffler specialty shops were the most rapidly growing segment of the replacement ESP market, which would and did make this market an enticing one for a large ESP firm such as Walker to

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[32] The record reveals that beginning in late 1973 and continuing into 1974 Triple S contacted 5 German firms to introduce the Terramatic shock absorber—Volkswagen, Daimler-Benz, GM-Opel, Fichtel & Sachs, and Bilstein. CX 68A–C, CX 67C, and CX 63C. Additional contacts in 1974 occurred with Armstrong, the British firm, and Questor in the United States, which manufactured shock absorbers under the Goerlich name. CX 67B, D–F. Notably, it appears that Triple S's contacts with all of these firms focused exclusively on the Terramatic shock absorber, not the other products Triple S then had in production. *Id.* The documentary evidence further reveals interest by these firms in the Terramatic, but at least some of these discussions ran aground due to Triple S's inability to deliver prototypes for testing, an inability apparently stemming from Triple S's straitened financial condition. CX 68B, CX 67C, CX 63C.

[33] For example, Walker's president, Mr. Cook, asserted at trial that his instructions were to pay nothing for the rights to the Terramatic design. (Tr. 1676–77) There are, however, reasons to be skeptical of this assertion apart from the numerous expressions of Walker's interest in Triple S for this very design. For example, although Mr. Cook asserted that "not a nickle" was paid for the Terramatic, Tr. 1676–77, the parties executed a license agreement providing for royalties on future Terramatic shock absorbers, as well as 4-wheel drive hubs. That agreement further provided that the patent rights in these products would revert to the licensor if the licensee failed to make its "best efforts" to produce at least one type of the licensed products within 4 years. CX 57D–E, CX 66A. Two years into that agreement, just months before the Monroe acquisition and perhaps a touch self-consciously, Mr. Cook prepared a memorandum to a subordinate which reads in its entirety:

> Just a reminder that in our purchase of Triple S, there were certain things that needed to be done within a specified time frame or certain rights reverted back to Petrak. If you do not have the details, please get them from Jim.
>
> I leave you with the responsibility of being sure we don't lose these rights by default and suggest it might be timely to follow up on them now. CX 70.

Other documents prepared at about the same time acknowledged that the acquisition of Monroe would be certain to be challenged by this agency, *see, e.g.*, CX 5D, creating the possibility that Tenneco's premerger documents were prepared with this litigation in mind. *United States* v. *Phillips Petroleum Co., supra,* 367 F.Supp. at 1238. This possibility, of course, makes even more difficult the task of ascertaining the subjective intent of Tenneco in the relevant time frame.

The alleged disinterest in the Terramatic principle is further contradicted by the efforts Walker made to investigate Triple S's attempts to sell the Terramatic in Europe. The record contains reports to Mr. Cook dated July, 1974, several months prior to the Triple S acquisition, from Walker Europe and Walker Deutschland, confirming that the companies approached by Triple S were favorable to the Terramatic but that Triple S lacked the finances to provide them with prototypes. CX 63A–D.

[34] Additional interest in the muffler shop business was expressed in 1976, when Walker negotiated the purchase of Car-X Service Systems, a chain then consisting of 45 or 50 muffler shops, although that purchase was not approved by Tenneco. Tr. 1663. Significantly, Walker planned to expand Car-X rapidly into a major national chain, CX 109G, 108P, corroborating its expansion plans for Speedy Muffler King.

move into. Tr. 1654. A large national muffler chain generates significant demand for shock absorbers. *See* discussion *supra,* 19–20.

Like the Triple S acquisition, Tenneco's at least partially visible move into the muffler shop business could hardly go unnoticed by rational shock absorber firms.

Finally, Walker's interest in entering into shock absorber production, again apart from the Monroe acquisition, was demonstrated by its negotiations in the immediate period preceding the merger with two foreign shock absorber firms which had modest sales in the United States. These firms are Armstrong, a British firm, which produces a full line of shock absorbers, I.D. 391–92, 399, and DeCarbon, a French firm, producing a superior quality "gas-pressurized" shock absorber. I.D. 402–03. *See also* discussion, *infra* 60–61. Walker's renewed interest in Armstrong, as revealed in correspondence between Mr. Cook and Mr. John Padget, the president of Walker Europe, began in 1974 when it was learned that "circumstances could be ripe for a takeover" of Armstrong. CX 80. Mr. Padget foresaw "substantial synergistic effects" from the acquisition between Walker ESP and shock absorber operations in Britain, Europe, the United States, Canada and elsewhere. CX 83B. Padget proposed that under the acquisition, Walker would sell Armstrong shock absorbers through Walker's channels, and make Armstrong shock absorbers in Walker's U.S. and Canadian plants. *Id.* Walker Europe went so far as to calculate acquisition prices which could be offered Armstrong shareholders under various levels of assumed future growth, while providing substantial return on investment to Walker. CX 83D, CX 84A–L. In October, 1974, however, Mr. Cook directed Padget to maintain [**40**]contact with Armstrong, but on a low-key level, until Tenneco decided how Walker's expansion should proceed. CX 85. Walker Europe remained interested in Armstrong, and reminded Walker of Armstrong's desirability in May, 1976, when Padget responded to information from Walker that Tenneco believed the time was right for investment. CX 88.

This period in 1976 also saw Walker interested in and negotiating with DeCarbon, a French shock absorber firm. CX 89–91. As with Armstrong, this interest in DeCarbon was expressed at high corporate levels by both Mr. Cook, president of Walker, and Mr. Padget, president of Walker Europe.[35] *Id.*

[35] Walker's broker communicated strong Walker interest to DeCarbon, CX 93–A, although at trial Mr. Padget denied authorizing those statements. Tr. 2705–06.

Other Potential Entrants

The loss of Tenneco as a potential entrant, actual or perceived, is significant for purposes of Section 7 only if it was one of a relatively small class of such potential entrants. If numerous firms are perceived by target market firms as similarly situated at their market's edge and of similar propensity to enter, the loss of one such potential entrant through merger is unlikely to loosen the restraints against anticompetitive conduct felt by target market firms, and the merger is therefore unlikely to lessen competition substantially. Similarly, the loss of a firm as an actual potential entrant is insignificant if numerous firms are equally capable and likely to enter in the reasonably foreseeable future, as that remaining group of firms maintains the promise of entry and eventual deconcentration. *See, e.g., FTC* v. *Procter & Gamble,* 386 U.S. 568, 580–81 (1967); *Heublein, Inc., supra,* at 588–89.

The burden of initially identifying a sizeable, plausible class of other potential entrants falls upon respondents, *Heublein, Inc., supra,* at 588–89, and respondent here urges that many firms are as likely to enter as Tenneco. All of these firms, however, Tenneco included, are said by respondent to be unlikely to enter given "formidable" problems of entry and "steadily shrinking" profits in the industry. RAB 27–28. This alleged broad class of similarly situated potential entrants is comprised of vehicle manufacturers, foreign shock absorber manufacturers, and other vehicle parts manufacturers. RPF 407–443, RRPF 190–200. [41]

We are persuaded by complaint counsel, however, that none of the firms so identified shared Tenneco's special combination of characteristics which established it as an especially potent and likely potential entrant. Further, very few of these firms can be considered to be even potential entrants, and none were as likely as Tenneco to make the attempt.

Respondent emphasizes that Bendix and TRW are as likely as Tenneco to enter the shock absorber market. Bendix is primarily a manufacturer of automotive braking components, but also manufactures parts for other automotive systems.[36] TRW, on the other hand, manufactures automotive engine and chassis parts and distributes reboxed shock absorbers. I.D. 435.

The ALJ considered Bendix, as well as brake parts manufacturers generally, and concluded that entry into shock absorber production was unlikely to come from that direction. I.D. 431–34. We concur.

[36] These include power steering units, electronic fuel injection systems, spark plugs, filters, universal joints and wiper blades. Tr. 9100, 9102, 9104.

There are significant incompatibilities at several levels between the two product lines which would make entry substantially less attractive to a brake producer than to an ESP firm. Great differences exist, for example, between the skills and tools required to repair brake systems and those needed to replace shock absorbers and ESP. *See,* I.D. 304, n.99. Thus, many shops which install shock absorbers and ESP do not perform brake work, I.D. 307, 314–18, reducing potential synergy savings from a unified sales force and joint shipments in the non-traditional channel. Further, the very nature of the sales forces differs between shock absorbers and brake parts, the latter requiring salespeople skilled in brake repair. Tr. 9108, 10,106.

In assessing the compatibility, or lack of it, between brake products and shock absorbers, we also give considerable weight to the recent exit in 1977 of Maremont, the leading shock absorber producer, from the brake friction material business. Tr. 9270. Moreover, brake parts firms do not appear to have a defensive motive to enter shock absorber production, while Tenneco feels pushed in part by its competitors' production of both ESP and shock absorbers. Tr. 10,109. *See also,* discussion *supra,* 30–31.

In addition, with respect to Bendix, we are persuaded that it considers shock absorbers a very different product line from its current lines of business, *see, e.g.,* Tr. 9137, [42]9139, and one in which it has no interest in entering,[37] Tr. 9137, 9148, 9168.

The trier of fact concluded from this and other evidence that Bendix had little incentive and no plans to enter the U.S. shock absorber market. I.D. 432–34. We see no reason to disturb those findings.

Engine, transmission, or chassis parts firms are also unlikely to enter into shock absorber manufacture. Like brake parts, these parts move primarily through the traditional channel, *see, e.g.,* Tr. 8929, again eliminating the possibility of synergy savings from joint sales and shipments in the fast-growing (for ESP and shock absorbers) non-traditional channel.

Much of the reason for the disparity in marketing channels used by ESP and shock absorbers versus the continued reliance on the

[37] That a Bendix subsidiary in Spain acquired a small Spanish shock absorber manufacturer, LIPMESA, does not compel a different conclusion. LIPMESA sells almost exclusively in Spain, Tr. 9115, not at all in the United States, Tr. 9116, and its production is focused on a very limited range of European vehicle makes: Renault, Citroen, and Fiat. Tr. 9116. Moreover, merely to assert, as respondent does, that Bendix's ownership of this firm demonstrates compatibility of brake systems and shock absorbers in the *United States* market, without more, requires us to assume too much, *i.e.,* that the Spanish replacement markets for these components are sufficiently analogous to their U.S. counterparts that the LIPMESA acquisition may be accorded some weight in predicting Bendix's intentions domestically. The record, however, is silent on this important aspect. Cf. *Heublein, Inc., supra,* at 588–89.

traditional channel for engine, chassis and front end parts is due in no small measure to the differing level of mechanical skill and shop equipment needed for repairs to these automotive systems. ESP and shock absorber replacement may be performed by a relatively unskilled and low-paid mechanic or by a consumer, and require relatively few tools. I.D. 304, n.99. In contrast, engine, chassis, and transmission parts require skill and sophisticated equipment to install. *Id.* Moreover, these firms, like brake parts firms, lack a defensive motivation to enter. For example, Moog, a chassis parts firm, carried a line of reboxed shock absorbers without success, and ultimately withdrew from that market. Tr. 3259, 3469. TRW, Moog's main competitor in chassis parts, has also been unsuccessful merchandising reboxed shock absorbers in the traditional channel. *E.g.,* Tr. 8932–33. [43]This lack of success has caused internal TRW recommendations that it exit from the sale of reboxed shock absorbers. Tr. 8934–36. Accordingly, we concur with the ALJ's conclusion that Moog and TRW, as well as these general classes of replacement parts manufacturers, are unlikely potential entrants into shock absorber manufacture.[38]

Nor do the automakers, apart from General Motors, which manufactures replacement shock absorbers under the Delco name, I.D. 184, n.77, appear to be likely potential entrants into the replacement market. Among the remaining automakers, the apparent trend is away from in-house manufacturing for even OE shock absorber requirements,[39] much less for the replacement market.

Nor can foreign shock absorber firms be considered to be as likely to enter as Tenneco, even though such firms possess product designs, manufacturing ability and the potential to spread scale economies in manufacturing across several continents. The difficulties a foreign firm would face include the establishment of a United States distribution network and winning consumer acceptance. Tr. 9256–57, 9277, 9933–37. These difficulties can be seen in the case of Armstrong, a British firm manufacturing perhaps the broadest line of shock absorbers in the world. Tr. 2615. Armstrong began distributing shock absorbers in the United States in the late 1950's, Tr. 2613, but by the time of trial had achieved only a one percent share of the United States replacement market, Tr. 2638. Its

[38] We find RX 263, which purports to identify potential entrants solely by manufacturing capability, RPF 414, an unhelpful guide, given (1) that it ignores the important synergies in sales, shipping, marketing and retail installation, *see* discussion, *supra*, 16–17, 23–27, and (2) that its focus is upon the one barrier to entry which appears most easily hurdled, *e.g.*, through a licensing arrangement. *See* discussion, *infra*, 57–58.

[39] *E.g.*, Ford discontinued conventional shock absorber production in 1977, and will manufacture only a portion of its needs for MacPherson struts in the future. Tr. 791, 862, 3730, 3778–79, 3942–43. Chrysler similarly ceased shock absorber manufacturing in 1975–76. CX 19–B, Tr. 10,158.

Canadian shock absorber assembly plant which opened in 1974, Tr. 2633, had closed by 1978. Tr. 9254, 9929, 10,159.

Indeed, the only other firms which appear at all likely to enter shock absorber manufacture are the two other major ESP producers which currently distribute reboxed shock absorbers, Midas and Arvin. These firms would share many of the same synergies attracting Tenneco towards shock absorbers, and both have actively considered moves into shock absorbers, I.D. 428–430, yet neither were as likely potential entrants as Tenneco. [44]

Midas' weakness *vis-a-vis* Tenneco stemmed in part from its more tenuous stature as an ESP manufacturer. Midas has not yet accomplished complete in-house manufacture of its ESP line, and aims to achieve this more immediate goal before moving into a new product line. Midas views itself as lacking certain aspects of engineering expertise needed for shock absorber production. Tr. 1288–90. Further, Midas ESP production is heavily devoted to supplying its franchisee's needs; sales of ESP to other replacement market firms accounts for a minor portion of Midas sales. Tr. 1283. Relatively few reboxed shock absorbers are sold in this small replacement market operation, Tr. 1284, leaving Midas' potential for shock absorber sales largely limited to that needed to supply its franchisees. That amount, however, is insufficient to justify self-manufacture. Tr. 1255–56 *in camera.*

Arvin, too, must be considered a less likely potential entrant than Tenneco, given Arvin's primary orientation as an OE rather than replacement market ESP supplier, its relative lack of success marketing reboxed shock absorbers, the decrease in financial support it offered its muffler shop franchisors, and its comparative lack of a defensive motive due to its smaller stake in the replacement market. Tr. 559, 576–79, 710–11, 909–10, 10,088–89.

We conclude from this review that no other firm raised as a potential entrant in this proceeding shared the unique combination of capabilities, interest and incentives which established Tenneco as both a potent and highly probable potential entrant into the shock absorber market. Thus, the loss of Tenneco as a potential entrant is highly significant in antitrust terms, as it meant no less than the loss of the single firm most likely and best able to enter and deconcentrate what is now a very highly concentrated market. *See, FTC* v. *Procter & Gamble Co., supra,* 386 U.S. at 580–81. That a small group of less potent and less likely potential entrants remains does not remove the anticompetitive consequences of the Tenneco-Monroe merger.[40] [45]

[40] *See, United States* v. *Wilson Sporting Goods Co., supra,* 288 F.Supp. at 563 (merger anticompetitive despite

(Continued)

Industry Perception of Tenneco

The strong confluence of objective factors leading Tenneco to enter the shock absorber market, and Tenneco's clear and visible interest in that entry were not unnoticed among firms in the shock absorber market. The record reveals that these firms actually perceived Tenneco as a likely potential entrant, and also perceived that few other firms were likely to enter. The most significant evidence in this vein was the testimony of Mr. Pond, president of Maremont, the leading shock absorber firm. He testified that prior to the Monroe acquisition he considered Tenneco as one of only three likely potential entrants into shock absorber manufacture, the other firms being Midas and TRW, and that these firms would find entry "tempting." Tr. 771–78. Moreover, TRW was believed to be less likely to enter than Tenneco. Tr. 775–76.[41]

Another strong and well-based perception of Tenneco's ability to enter into shock absorber design and manufacture comes from Mr. Putnam, the Chairman of Questor Corp. Questor had successfully [46]made precisely that move in 1958, when it diversified from ESP into shock absorbers with the acquisition of Heckethorne, then a marginal shock absorber manufacturer with a product that was not well received. Significantly, Questor re-engineered the product, replacing its "one tube" design with a more conventional "two tube" product, and gained market share with the new product. *See* discussion, *infra*, 62. Thus, considerable weight is due Mr. Putnam's perception that Tenneco was capable of *de novo* entry.[42]

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the fact that three other large sporting goods firms were also interested in target market, Spaulding, MacGregor and Rawlings, plus a fourth, Medalist, with actual plans to enter and undeterred by the merger); *British Oxygen Co.*, 86 F.T.C. 1241, 1353–1354 (1975), *rev'd on other grounds sub nom. BOC International Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977) (Commission finds merger anticompetitive where there were only three other potential entrants and none were "very strong" entry candidates). *See also, V.*, P. Areeda & D. Turner, *Antitrust Law*, ¶ 1123 at 123–24 (1980) ("a universe exceeding three *similarly well-qualified* potential entrants should be presumptively sufficient to obviate concern") (emphasis supplied).

[41] Tenneco was perceived as a more likely entrant than TRW because of the similarity in manufacturing shock absorbers and ESP, based on the importance of steel tubing in both products. Mr. Pond believed that entry by an ESP manufacturer would be "much easier" from a manufacturing standpoint than entry by a suspension parts firm. Tr. 775–76. He saw this entry coming either by the entrant commencing shock absorber manufacturing at the outset or first distributing shock absorbers to build volume, followed by a move into manufacturing, and believed that this choice would depend upon the entrant's financial resources. Tr. 772–73. Mr. Pond's perceptions were supported by those of his former vice president for research and engineering, who believed Tenneco had the capability to engineer and manufacture shock absorbers, and that he saw Tenneco's capabilities in this area as being at least as good or better than firms which manufactured other types of automotive products, including brake parts and suspension parts. *See, e.g.*, Tr. 438–40, 480–82. In forming his perception of Tenneco's capabilities, he emphasized Tenneco's highly efficient production of ESP, Tr. 482, and the similarity in engineering the flow of gases in an exhaust system with engineering the flow of hydraulic fluid in shock absorbers, based on his own experience in transferring his engineering skills from the one product to the other. Tr. 484–85.

Mr. Pond also perceived Walker was a more likely entrant than Arvin, because Arvin's orientation was primarily as an OE supplier, while Walker was heavily oriented toward the replacement market. Tr. 864–65.

[42] Q In your opinion, Mr. Putman, did Walker or TENNECO have the ability to enter into manufacture and sale of shock absorbers without acquiring Monroe?

A Yes, sir. We did it, in our second phase of getting into the two-tube shock.

(Continued)

A perception of Tenneco as a likely, capable potential entrant was held by Midas as well, an ESP firm near the fringe of the shock absorber market which itself has considered from time to time entry into shock absorber manufacturing, *see* discussion, *supra,* 43–44, and thus would be well positioned to judge which other firms would be likely to enter. Significantly, Midas saw Walker as one of only two likely potential entrants, the other being Arvin. Tr. 1248–49.[43] [47]

In contrast, Tenneco presented the testimony of a senior marketing official at Monroe that he never considered Tenneco a likely potential entrant into shock absorber manufacturing, and that no officers or directors of Monroe ever raised that possibility with him. Tr. 3973–74. He testified further as to an extensive list of firms which he did consider likely potential entrants into the replacement shock absorber market.[44] This testimony, however, even if taken at face value, cannot rebut the contrary testimony of actual perception by Maremont, the other major industry member, for the procompetitive effects from such a perception by Maremont would still exist, and would be lost by the merger.[45] [48]

This proof of actual perception, moreover, goes beyond the level of proof found to be sufficient in other potential competition cases. Substantial authority exists for the proposition that the perceptions of firms in the target market may be inferred from objective economic criteria which identify a firm or class of firms as likely to enter the target market. *United States* v. *Falstaff Brewing Corp.,*

Q In your opinion, how could TENNECO or Walker have penetrated the replacement market with shock absorbers?

A In my judgment, they could have done the same thing we did in our second phase. They could have set up a facility and hired the proper technical people and the production people and marketing people, to set up an organization and go out to some of the national accounts where their contacts are as good as ours and offer them a quality product at a fair price, and I think they would have gotten their share of business, same as we did. Tr. 1145–46.

[43] Another glimpse of the industry's perception of Tenneco as one of the few firms likely to enter shock absorber production may be gleaned from the circumstances surrounding the Triple S acquisition in 1974. It appears that in offering its Terramatic shock absorber design to prospective purchasers, Triple S went to domestic and foreign shock absorber manufacturers. *See* discussion, *supra,* 37. As far as we can determine, Tenneco was the only firm not manufacturing shock absorbers which was approached by Triple S.

[44] Included were vehicle manufacturers (General Motors, Ford, Chrysler, Volkswagen, Toyota Nissen, Honda); foreign shock absorber manufacturers (Boge, Fichtel & Sachs, Bilstein, Armstrong Girling, Woodhead, Cofap, Kyaba, Tokiko, Showa); and other domestic auto parts manufacturers (Rockwell, TRW, Wagner Electric, Dana, Ecklund, Eaton, Federal-Mogul, Budd, Bendix, Borg-Warner). Tr. 3979–86.

[45] While it is thus unnecessary to reach the question of Monroe's true perception, we see little reason to treat the subjective perception of a potentially biased target market firm differently from the subjective intent of a firm said to be an actual potential entrant. That is, purported lack of subjective perception (or intent to enter) should be given little weight if the objective economic evidence points to a contrary conclusion. *See, United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 566 (Marshall, J., concurring); *cf. United States* v. *Siemens Corp., supra,* 621 F.2d at 508 (subjective evidence entitled to some weight when supported by objective evidence); *FTC* v. *Atlantic Richfield Co., supra,* 549 F.2d at 298 (subjective evidence deserves some weight where objective evidence is not strongly to the contrary). Here, of course, the purported absence of a subjective perception of Tenneco at the fringe is suspect given the obvious self interest of Monroe in preserving the merger and is countered by the overwhelming objective evidence pointing to the likelihood of a entry attempt, and the prior history of entry by ESP firms.

supra, 410 U.S. at 532–34; *United States* v. *Marine Bancorporation, supra,* 418 U.S. at 639–40.[46] Here, ample objective evidence related to the capabilities, incentives and interest of Tenneco in entering the replacement shock absorber market, *see* discussion, *supra,* 15–40, factors which could hardly go unnoticed by "rational shock absorber manufacturers." The likelihood that target market firms would perceive Tenneco as a likely potential entrant is enhanced, moreover, by an additional objective factor, the prior entries by other replacement ESP firms into the replacement shock absorber market. *See,* discussion, *supra,* 17–18, *infra,* 62–64. **[49]**

The perception by firms in the target market of a likely potential entrant perched at the edge of their market and the likely present procompetitive effects which flow from that sobering perception may exist independently of the internal plans of the potential entrant, or of other factors which block, at least temporarily, actual entry by that firm. *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 532–33. *See also, FTC* v. *Procter & Gamble, supra,*386 U.S. at 580–81.

In the present case, the ALJ, as we will discuss in greater detail below, found Tenneco not to be an actual potential entrant because of a lack of evidence that Tenneco was planning to enter *de novo* and because he believed that no viable toehold was available at the time of the acquisition. I.D., p. 119.

Although we disagree with the ALJ on the issue of actual potential entry, accepting his view would not alter our finding of industry *perception* of Tenneco as a potential entrant. In particular, he found that the two "viable" toehold firms which Tenneco had under consideration were unavailable because of an inability to agree with one firm over price, I.D. 406–08, and a lack of interest by the other firm, at least at the price offered. I.D. 394–97. These difficulties in negotiation, however, were, by their very nature, unlikely to have been known to anyone outside the immediate parties involved, and so would not diminish the perception of Tenneco as a likely entrant.[47] **[50]**

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[46] In *Falstaff,* a majority of the Court held that the district court erred in failing to consider whether Falstaff was likely to have been perceived as a probable potential entrant based upon objective evidence, 410 U.S. at 533–34, n.13.

On remand, the district court reviewed that objective evidence and found that a firm in the target market would have perceived Falstaff as unlikely to enter. Thus, the presence of Falstaff on the edge of the market "could not have any procompetitive effect on behavior in said market." *United States* v. *Falstaff Brewing Corp.,* 383 F.Supp. 1020, 1023–24 (D.R.I. 1974).

The Supreme Court's subsequent decision in *Marine Bancorporation, supra,* continued to rely upon objective evidence which would tend to prove or disprove the likely procompetitive effect of a potential entrant poised at a market's edge. Skipping over the intermediate step of the perception of target market firms, the Court found that the district court did not err in its conclusion that no "wings effect" was likely based on its review of "the economic facts." 418 U.S. 602, 639–40. In this assessment, the Court gave great weight to regulatory barriers to expansion by the acquiring bank, barriers which banks in the target market would be expected to be well aware of. *Id.*

[47] Indeed, the record demonstrates the sensitive nature of the discussions. For example, in its negotiations

(Continued)

Further, the unavailability of firms as acquisition candidates does not affect the feasibility of entry through licensing from a foreign firm. *See* discussion, *infra,* 57–60. Thus, even if target market firms believed that Tenneco's talks with Armstrong and DeCarbon would not lead to merger, those firms could rationally perceive that Tenneco could license manufacturing technology from either firm.

Thus, we find that objective evidence is fully consistent with the actual perception of firms in and near the target market that Tenneco was a likely and capable potential entrant into the shock absorber market.

Present Procompetitive Effects

The importance of the perception by one or more target market firms of a significant potential competitor at their market's edge stems from the likely beneficial influence that such a perception will have on decisionmaking within the target market. Such decisions are expected to be more akin to those of a competitive market, to the benefit of consumers and competition generally, as target market firms attempt either to forestall entry by the new firm or to be better prepared for a new, more competitive environment if the feared entry materializes. An instance of the latter behavior was found in *Brunswick Corp., supra,* where a domestic outboard motor manufacturer, OMC, acted to upgrade its 25-horsepower model to the level established by a similarly-sized product of Yamaha, a feared potential entrant. *Id.* 1222, 1273.

Brunswick was atypical in that at least some of the procompetitive effects could be directly traced to the perception of Yamaha at the market's edge. The more usual case will not present such a clear showing of causality, given the likely existence of multiple influences on any business decision, *e.g.,* the influence of existing competitors within the market, the level of overall demand for the product, general economic conditions, and the like. These practical limitations on our ability to trace causality are accommodated by the standard of proof under Section 7, *i.e.,* it is sufficient to establish the "*probability* that the acquiring firm prompted premerger procompet-

with DeCarbon, a family owned French firm, Tenneco's broker sought more information to justify an asking price which was high in relation to reported profits. CX 92, CX 93. He wrote DeCarbon that:

> TENNECO-WALKER, and Ameutec are sufficiently experienced in Europe to appreciate that a family owned company keeps records differently than the publicly held company, and TENNECO-WALKER would be discrete and ethical enough to keep *all confidential disclosure* from you in *absolute confidence.* CX 93B (emphasis in original).

itive effects within the target market." *United States* v. *Marine* [51] *Bancorporation, Inc., supra,* 418 U.S. at 625 (emphasis supplied).[48] [52]

In the instant case, there are indications that the competitiveness of the shock absorber industry increased in the years just prior to the challenged acquisition, and reasons to believe that the perception of Tenneco at the market's edge was a significant factor stimulating this new competitive vigor.

These changes appear to have begun with Maremont in 1968, Tr. 777, at the time when Tenneco first began expressing interest in shock absorber production through its talks with Armstrong, *see* discussion, *supra,* 32. Beginning at that time, Maremont began a program of heavy investment in three aspects of its shock absorber program, each significant to defending against the threat of Tenneco's entry.

One such area was in inventory levels, which determine the completeness with which orders can be filled. During this period, Maremont invested "considerably more" in inventory in order to provide a level of "order fill" in the range of 98 to 99 percent, even though industry practice at that point demanded only 90 to 92 percent availability[49] , Tr. 777–78, benefiting wholesalers, jobbers and ultimately consumers through improved availability of product.

A second area of Maremont activity was in new product development. During this period Maremont introduced a new "air-oil" shock absorber and engaged in extensive research and development of a self-leveling and self-adjusting shock absorber. Further, Maremont moved strongly into the relatively new area of MacPherson strut replacement cartridges. Tr. 778.

Finally, and perhaps most significantly, Maremont made great efforts over this period, and especially in the years coinciding with Tenneco's greatest interest, to reduce its cost of manufacture. These

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[48] *See also, United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 526:

> The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with *likely* influence on existing competition. . . . The Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the lifeblood of antitrust law. *Id.* at 533–34, n.13; (emphasis supplied).

FTC v. *Procter & Gamble Co., supra,* 386 U.S. at 580–81 (Court found it "clear that the existence of Procter at the edge of the industry exerted considerable influence on the market" based on review of objective evidence and assumption that target market behavior would be influenced); *United States* v. *Phillips Petroleum Co., supra,* 367 F.Supp. at 1232–39, 1254–56 *aff'd per curiam,* 418 U.S. 906 (1974) (edge effect found based on objective factors and perception of Phillips as a likely entrant). *Cf. United States* v. *Siemens Corp., supra,* 621 F.2d at 509 (presumption of edge effect rejected where fringe firm neither likely to enter nor perceived as likely to enter by target market firms).

The presumption of an edge effect in appropriate circumstances is consistent with the overall thrust of Section 7, which is concerned "with probabilities, not certainties." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 (1962); *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. at 534 n.13.

[49] *See* discussion, *infra,* 54 n.51.

cost savings, and more, were passed on to consumers in lower shock absorber prices. Indeed, there is evidence that Maremont was *absorbing* cost increases in the period immediately prior to the Monroe acquisition. Tr. 778–79, 855, I.D. 449. Moreover, the impact of this edge effect was widespread. Price cutting caused by cost reductions and/or cost absorptions was not limited to Maremont; Monroe and the remaining producers were forced to match Maremont's prices to the benefit of consumers. Tr. 779, 854, 4071–72, RX 58. **[53]**

Although we need not trace these substantial and varied procompetitive effects directly and solely to the perception of Tenneco on the edge, *United States* v. *Marine Bancorporation, supra, United States* v. *Falstaff Brewing Corp., supra,* there is evidence indicating that that perception did, in fact, play a role in causing Maremont to engage in the activities set forth above. There is, for example, the testimony of Mr. Pond of Maremont in discussing the cost reduction program:

> One of the ways that you strengthen your position in a business *and restrict or limit the amount of competition that you are faced with* is to make considerable efforts to become a low-cost producer. We have had as a company very aggressive cost-reduction programs over the past eight or nine years, but more specifically, over the past three to four years, to reduce the cost of our product, to reduce the cost of our every-day market products. Tr. 778–79. (emphasis supplied)

Given Maremont's actual perception of Tenneco as the most able of just a few potential entrants, *see* discussion, *supra,* 45, and objective economic evidence similarly placing Tenneco as the single most likely such entrant, *see* discussion, *supra,* 41–44, we are persuaded that these efforts to "restrict or limit" competition were in large measure aimed at deterring a destabilizing *de novo* or toehold Tenneco entry.

Our reading of the evidence is thus contrary to that of the ALJ, who found after reviewing Mr. Pond's testimony that "while it may not be entirely clear, it appears to support respondent's view [that the requisite effects were not shown]." I.D., p. 120. The ALJ found "crucial" a carefully couched statement by Mr. Pond that Maremont did not "specifically" examine potential competition "on a periodic basis" in formulating its strategy.[50] I.D., p. 120. **[54]**

The ALJ found this testimony insufficient to establish the present

[50] The relevant testimony in full is as follows:

Q. Did the presence of Walker, [Midas] and/or TRW as likely potential entrants into the shock absorber market, have any effect on Maremont's decisions, business decisions?

A. I don't think that we looked specifically at competitors on a periodic basis or potential competitors, in developing our strategy. I think we developed our strategy and approach to the business based on how we perceive it and how we perceived the opportunities. Tr. 776–77.

procompetitive effect of Tenneco because he read it to mean that Maremont did not take Tenneco "*directly* into account in making its business decisions." I.D., p. 120. (emphasis supplied) This standard, however, of demanding clear, subjective evidence of an actual direct edge effect is inappropriate for Section 7, which is concerned with the probable anti-competitive impacts of acquisitions. *United States* v. *Falstaff Brewing Corp., supra, United States* v. *Marine Bancorporation, supra.* "Potential competition cannot be put to a subjective test." *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 174; *United States* v. *Falstaff Brewing Corp.,* 410 U.S. at 534 n.13.

The ALJ similarly dismissed other Maremont testimony as "unclear" because it does not establish whether Maremont's heavy investments were to stave off actual or potential competition. I.D., p. 120–21. Although we find that this standard again puts too fine a point upon an inquiry concerned with the probability, not certainty, of a present procompetitive effect, analysis of the investments made by Maremont leads to the conclusion that the motivation behind them can more logically be found in the concern for potential rather than actual competitors.

For example, Maremont testified that it invested heavily in inventory to improve the quality of its service, its rate of "order fill," to a level substantially higher than the industry standard then in effect.[51] The record does not reveal competitive pressure from Monroe or others within the replacement shock absorber market to improve service, but an extraordinary level of order fill could be a useful weapon against a feared potential entrant. One obvious impact is in raising the investment in inventory needed by a potential entrant to compete in winning over new accounts, making entry more expensive. Providing improved service to its accounts also can reasonably be expected to increase the loyalty of those accounts to Maremont, **[55]**to increase the difficulty facing a new entrant in winning market shares generally, and to push whatever loss did arise onto Monroe or others. Finally, there is the possibility that Maremont was responding to an expectation that Tenneco, upon entering, would set a high standard of service, comparable to what it was already providing in the replacement ESP market. CX 27N.

Similarly, a better explanation for Maremont's cost-cutting and cost-absorption can be found in fear of potential entry than in the

[51] The record demonstrates only that a rate of order fill at the level of 80 percent or below may be unsatisfactory in the replacement shock absorber market. Tr. 968, 1627–28, 1630–32. In his discussion of the standard of order fill in this market, I.D. 226, 284, the ALJ erred in lumping together practices in the replacement ESP market with the shock absorber market, *id.*, especially in light of direct testimony that the normal level of order fill in the shock absorber market is in the range of 90–92 percent, Tr. 777. There is evidence that the standard in the ESP market is close to 100 percent, and, significantly, is set by Walker. *See,* CX 27N, Tr. 9437–38.

actual competition which then faced the firm. One would not expect a firm in such a concentrated market voluntarily to absorb cost increases and thereby cut its rate of return. Rather, one would expect Maremont merely to pass such increases through in the reasonable expectation that its one main competitor will find that enlightened self interest lay in following a similar course.

Even investments in cost-cutting, which generally would appear not to be inhibited by a high level of concentration, as the payoff from that investment could be retained by the firm, here appear motivated by fear of potential entry rather than by the present competition facing Maremont. Maremont, it must be noted, had a large proportion of its sales, 41 percent, going to one account, Sears, Roebuck and Co., and an additional 14 percent going to three other mass merchants. RAB 54 *in camera.* Although the record does not disclose the nature of Maremont's contractual relationships with these other big accounts, it does demonstrate that the Sears contract provided for payment on a *cost-plus* basis, *i.e.,* projected actual cost for the contract **[56]**year plus a fixed percentage of that cost as Maremont's return.[52] RAB 55 *in camera.* This arrangement is significant for it limits the return which Maremont could obtain from investments in new, cost-saving technology. Thus, the benefit to Maremont of investment in this area is substantially less than it would otherwise seem to be.

Investment in cost-reducing technology, however, might be completely justified as an attempt to deter entry by Tenneco, or to be better prepared for more rigorous competition following entry. Indeed, Maremont recognized that Tenneco was a highly efficient ESP manufacturer. Tr. 439.[53] **[57]**

In conclusion, we find that the various improvements in the competitiveness of the replacement shock absorber market in the

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[52] At the close of the year, Sears' auditors would examine Maremont's actual production costs, and "redetermine" the cost-plus figure. If Maremont's costs exceeded the projection at the beginning of the year, Maremont received only the originally projected cost plus the fixed percentage. If Maremont succeeded in cutting costs, *half of the actual savings were refunded to Sears.* Further, it appears that the new, lower cost figures would become the basis of the calculations for the next year, giving Maremont none of the benefit of these savings in the second and succeeding years, at least in its business with Sears. RAB 55 *in camera.*

[53] Respondent argues that Sears' "buyer power" instigated the wave of increased competition which swept across the shock absorber industry in the early 1970's. *See, e.g.,* RAB, 54–57. The "power buyer defense," in brief, asserts that sufficiently dominant buyers can insure that even a concentrated market behaves competitively, obviating concern over the loss of potential competition. *Id.* at I.D. 204. Although the power buyer defense has met, at best, a lukewarm reception in cases lacking the extreme concentration present here, *see, e.g., United States* v. *Black and Decker Manufacturing Co., supra,* 430 F.Supp. at 754–55, we find it wholly inapplicable to the present case. As discussed above with respect to cost cutting, the improved competitiveness in the shock absorber market seems much better explained by the perception of Tenneco at the edge than by pressure brought to bear by Sears or other buyers. Similarly, there is no indication that Sears was unhappy with Maremont's service or otherwise instigated Maremont's inventory buildup; if anything, the presence of a large, predictable account such as Sears would seem to permit less, not more, inventory on hand. There is also no indication that Sears provided the motivation for Maremont's plunge into new product development.

pre-merger period cannot be adequately explained by factors indigenous to that market. Rather, the competitive upsurge appears closely related to the presence of Tenneco poised on the market's edge, in short, an actual edge effect.

Actual Potential Entry

A second, independent violation is that Tenneco, at the time it acquired Monroe, was itself an actual potential entrant into the replacement shock absorber market. The elements of this violation are largely co-extensive with those which establish Tenneco as a perceived potential entrant, *i.e.,* the prerequisite of a concentrated target market, the need for the firm to have capabilities, interest and incentive such that it is a likely potential entrant, and the requirement that few other firms be similarly situated. However, two distinct additional elements are required as well: (1) that the firm had available to it a feasible means of entry other than through the challenged acquisition and (2) that entry through that alternative route carried a reasonable prospect of deconcentration or other beneficial procompetitive effects. *United States* v. *Marine Bancorporation, supra,* 418 U.S. at 633.

There were, in fact, various alternative methods of entry available to Tenneco at the time of the Monroe acquisition. We have little doubt that, given its existing capabilities, *see* discussion, *supra,* 15–23, Tenneco could have entered *de novo,* without even the aid of technology licensed from another shock absorber firm.[54] While Tenneco did not demonstrate interest in attempting entry on such a completely *de novo* basis, I.D. p. 119, it did express interest in entry aided by technology licensed from a foreign firm. I.D. 360. International licensing appears to be common in the shock absorber industry, and includes the transfer of product designs, manufacturing know-how, trade names, parts, machinery and training. Tr. 9265–67, 4412, 2862–64, 9166.

Tenneco did not need all of these elements to enable it to enter the replacement shock absorber market. A license would have been most useful to it in supplying it an initial design[55] and any details of shock absorber production know-how it lacked, but Tenneco already possessed much of the additional skills and [58]assets a licensor could provide by the time it acquired Monroe. For example, Tenneco

[54] Indeed, Tenneco expressed some confidence in its ability to design and manufacture its own shock absorbers. *See,* CX 75.

[55] The record demonstrates that a firm may use a licensed design for its first generation of shock absorbers, and later move on to its own internally developed designs. *See, e.g.,* discussion, *infra,* 62 n.66. Tenneco, in fact, had such a design under development in the Terramatic. *See* discussion, *supra,* 20–21.

had already established itself as an efficient producer of rolled steel tubing, a major input in shock absorber production, and possessed significant proprietary knowledge in this area. *See, e.g.,* I.D. 269. *See also,* discussion, *supra,* 15. It also possessed the Walker tradename, already well established in the replacement ESP market.[56]

Tenneco, had it wished to pursue the license route rather than the Monroe acquisition, very likely could have obtained whatever technology it desired. *See, e.g.,* Tr. 10172–73. There were a substantial number of foreign firms, at least seven, which did not have any United States licensees at the time of trial. Tr. 2472, 2602–03, 2865, 10172.

Licensing is not a hypothetical method of entry into shock absorber production; the record reveals that it is in fact common. Tr. 780–81, 2472, 2584–86, 2602, 2628, 2641–44, 2845–46, 2863–64, 4388–89, 4412, 9116–17, 9232, 9265–67, 9397, 10170–73, 10847. Nor is it difficult to see how licensed technology could assist a firm as well-positioned as Tenneco in completely surmounting the steep barriers to entry which surround the replacement shock absorber market.

Those barriers to entry, as discussed earlier, include the need for substantial capital, a nationwide distribution network, marketing ability, brand-name acceptance, technology to produce at a competitive price, and volume sufficient to support an MES plant.[57]

There is little doubt that Tenneco could scale or already had scaled, most of these barriers. What remained were aspects of technology, available through license, and the establishment of volume sufficient to support an MES plant. That volume appeared attainable; Tenneco's penetration of the replacement market would be aided by volume from several sources. As discussed above, Tenneco had already committed itself to building a nationwide chain of muffler shops, which would alone generate demand for 12 to 25 percent of the demand needed to support an MES plant.[58] In addition, Walker already sold Monroe shock [59]absorbers as well as its own Mechanex steering dampers.[59] Manufacturing these products from its own plant would contribute approximately another 3 percent to MES volume. *Supra,* 21 n. 20. Additional immediate areas for volume could come from supplying shocks to Tenneco's growing chain of European muffler shops, and the possibility that a foreign licensee would supply its United States sales from Walker. CX 76.

[56] While the Tenneco and Walker names were obviously not established with respect to shock absorbers, the excellent reputation associated with each would aid acceptance of a new shock absorber line, especially with WD's. Tr. 10193–97, 10204.

[57] *See* discussion, *supra,* 12–13.

[58] *See* discussion, *supra,* 19–20.

[59] The shock absorbing cylinders for those dampers were obtained from Maremont, *supra,* 20.

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Finally, it would appear that the opportunity for OE sales would present an additional area for Tenneco to build volume at a new facility.[60] Although substantial barriers exist for OE suppliers to enter the replacement market, especially in the need for broad product line, nationwide distribution and marketing ability, *see* discussion, *supra,* 6–7, the barriers are obviously lower when a replacement market firm seeks OE sales. The primary prerequisites for such sales would be some additional, technically focused salespersons, a plant site not too far distant from the recipient assembly plant, and sufficient excess capacity, *see* discussion, *supra,* 6. This final factor would obviously mesh well with Tenneco's initial replacement market volume. Thus, Tenneco could reasonably anticipate having initial demand for shock absorbers sufficient to supply a substantial portion of the volume needed to support an optimally-sized, MES plant.[61]

Entry with the aid of licensed technology could occur very rapidly, potentially even faster than the planned expansion of Tenneco's chain of muffler shops into a major national network. Although Tenneco's expansion of its muffler shop chain was planned to take five years, *see* discussion, *supra,* 19, shock absorber production could commence under license in as little as two years. Tr. 2642–43. These time frames, combined with Tenneco's great and quickening interest in the replacement shock absorber market, cause us to conclude that there existed the strong probability that Tenneco would **[60]**have entered by alternative means within the near term had Tenneco not acquired Monroe. *Compare, BOC International* v. *FTC,* 557 F.2d 24, 29, (2d Cir. 1977).

A second mode of entry, via toehold acquisition,[62] was also both

[60] That OE sales might aid a profit-maximizing entry into the replacement market says only that such sales are desirable, not that they are necessary. *Cf.*, RAB 44–45. Moreover, the record is clear that the replacement market in the United States is sufficiently large to support MES production without dependence upon OE sales, Tr. 9256, and Tenneco's existing replacement market distribution network made it particularly able to enter without OE sales.

[61] We believe, moreover, that Tenneco would, in fact, enter with an MES-sized plant, even though initial demand would fall below that level. In this vein, we concur with the view of Dr. Nelson, complaint counsel's automotive expert, who believed that Tenneco would choose to build on that scale initially, and build volume up to MES level gradually over a number of years, and accept some cost disadvantage during that time the plant was under-utilized. Tr. 11020.

[62] Blackstone, with its .4 percent share of the market, clearly qualifies as a toehold firm. *See,* Tr. 10993 *in camera.* Foreign firms with similarly modest shares of the United States' market such as Armstrong and DeCarbon also qualify as toehold firms, even if they possess very substantial market shares in other countries. The district court, however, in denying a preliminary injunction in this matter, *FTC* v. *Tenneco,* 433 F.Supp. 105 (D.D.C. 1977), held that the Commission had not demonstrated the existence of a feasible toehold. *Id.* at 114. The court defined a toehold as, *inter alia,* a firm "not dominant or otherwise significant in the American *or foreign* market," citing *Missouri Portland Cement Co.* v. *Cargill,* 498 F.2d 864 (2d Cir. 1974). *Id.* at 112. *Missouri Portland,* however, involved firms dominant in other geographic markets *within the United States.* We see little basis either in law or in logic, to extend the concerns of Section 7 to any conceivable anticompetitive impact upon the domestic market in Britain or France.

Nor do we view a foreign firm's dominant position in its domestic market as highly probative of even its potential market share in the United States. While some excess capacity in a foreign plant could obviously be used

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feasible and available. A toehold would, like a license, provide technology, but would offer an additional advantage as well: the toehold's sales volume would be added to the volume Tenneco could already piece together through other avenues.

While respondent disputes the availability for acquisition of foreign firms such as Armstrong and DeCarbon, their feasibility as entry vehicles is not contested. Armstrong, for example, produces one of the world's most complete line of shock absorbers, *see* I.D. 391–92, 399, and Tenneco actively sought Armstrong [61]technology. I.D. 360–61. In terms of volume, Armstrong also would contribute to an additional 400,000 units annually to Tenneco's sales in the United States. *See,* I.D. 399. Armstrong further provided the possibility of supplying initial United States sales from the foreign, MES-sized plant until domestic sales volume rose to a level sufficient to support a new plant in the United States, an option actively considered by Tenneco in its discussions with Armstrong. *See,* I.D. 360, 362. A European toehold could fit well with Tenneco's expansion of its muffler shop chain in Europe, CX 109F, 106C, by supplying those shops with shock absorbers. *See* CX 83B.

The acquisition of a small, struggling domestic firm, Blackstone, also would have served as a viable method of toehold entry, although this route would have been more difficult and less attractive than the acquisition of a substantial foreign firm such as Armstrong. There is no dispute that Blackstone was burdened with aged equipment, a less than complete product line (it produced only 1″ and 1-$^{3}/_{16}$″ conventional shock absorbers), declining market share and a mediocre reputation. I.D. 410–412. Even so, we believe that the ALJ erred in concluding that the firm was not a viable vehicle for Tenneco's entry into the replacement shock absorber market. I.D. 413.

The ALJ failed to consider how Blackstone's assets, although limited, could have aided Tenneco in surmounting the barriers which remained before it. In making his negative determination, the ALJ also neglected to consider the historical evidence of prior entry into the shock absorber replacement market through the acquisition, by an ESP firm, of a troubled toehold. Close scrutiny of an ailing toehold's capabilities, especially in light of what assets the acquiring firm could bring to it, is necessary, given the strongly procompetitive effects likely to flow from such an acquisition and subsequent efforts

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to supply expanded sales in the United States, we truly doubt that a foreign firm would devote all its capacity to an effort in the United States, and thereby abandon its hard-won domestic sales base, and its investments in a domestic sales force, good will, customer contacts, warehouses and so forth. *Cf.* W.M. Landes and R.A. Posner, *Market Power in Antitrust Cases,* 94 Harv. L. Rev. 937, 963–70 (1981).

to improve that firm and to expand its market share. *See, e.g., The Bendix Corporation,* 77 F.T.C. 731, 819 (1970) *vacated and remanded, FTC* v. *Bendix, supra; The Stanley Works,* 78 F.T.C. 1023, 1078 (1971).

Blackstone, like Armstrong, would have brought to Tenneco another increment of United States sales in its efforts towards establishing unit volume capable of supporting an MES plant.[63] **[62]** It also possessed designs and manufacturing know-how for the 1″ and 1–3/16″ conventional shock absorbers it then had in production, as well as prototypes of both air-and spring-assisted shock absorbers, and the technical expertise to build them. I.D. 410. These additional items would provide a full product line, save for MacPherson strut replacement cartridges.

The feasibility of entry through a firm such as Blackstone has been demonstrated by Questor's acquisition of Heckethorne in 1958, and Questor's subsequent expansion of that firm. Although such analogies can never be exact, we think the circumstances of Heckethorne in 1958 and Blackstone in 1976 were sufficiently similar to provide us some guidance.[64] Heckethorne was successfully expanded to a significant factor in the market[65] even though, at the time it was acquired, it offered less technology to its acquiring firm than Blackstone did to Tenneco in 1976. In particular, when it was acquired, Heckethorne offered little in the way of design and production know-how.[66] **[63]**

This analysis is further supported by testimony from high officials from both shock absorber[67] and ESP[68] firms. **[64]**

There is, in addition, the example of the extraordinarily successful expansion of Gabriel following its acquisition by Maremont in 1962.

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[63] In this instance, the contribution would have been less, approximately 250,000 units annually, Tr. 10993 *in camera.*

[64] For example, it appears that Heckethorne's market share was considerably greater at the time of its acquisition than Blackstone's. *See, e.g.,* Tr 10216–17 Yet Tenneco now, unlike Questor then, has the prospect of substantial sales through its muffler shop chain and through other means, *see* discussion, *supra,* 19–21, roughly compensating for this seeming difference in initial volume.

[65] Its market share in recent years is in the 7 to 9 percent range. Tr. 10936–37 *in camera.*

[66] Its product at that time was an odd-looking mono-tube design produced under license from DeCarbon, the French firm. Tr 1114-15. While the design was functional, its unusual appearance gave it poor acceptance in the trade and Questor was unable to increase its market share in the first five years after the acquisition. Questor then designed a new line of conventional two-tube shock absorbers, and produced them, essentially from scratch. Tr. 1109–15, 1179.

[67] The Chairman of Questor, Mr Putman, testified to the relevance of Questor's history to Tenneco's ability to enter the shock absorber market. When asked whether Tenneco could have entered without Monroe, he testified that it could have, and supported that opinion with his own firm's experience in expanding from its base with Heckethorne. *See* discussion, *supra,* 46.

[68] These officials testified that Blackstone would have been a viable toehold for Tenneco. According to Mr. Baker, the Executive Vice-President of Arvin,

> Walker, with their number one position in ESP and with their financial wherewithal, could take a Blackstone and do wonders with it. They certainly could move a Blackstone off of an eighth or tenth list and move it right up through the pack somewhere. Tr. 602.

Similarly, Mr Moore of Midas, who had visited Blackstone's plant, *see, e.g.,* I.D. 429, believed that Tenneco would, with Blackstone, become a significant shock absorber producer. Tr. 1325–26.

Although this history is necessarily less relevant than the experience of Questor given Gabriel's significant market share at the time of acquisition,[69] it does merit some weight, inasmuch as Gabriel was in a downward trend when it was acquired, Tr. 10225, 10231–35, a trend which was dramatically reversed following the firm's acquisition by Maremont, Tr. 10235–39. Gabriel's market share has at least doubled and has possibly increased four-fold. Maremont today is the number one firm in the replacement shock absorber market.

Not only were these toeholds feasible, they were available as well. The availability of Blackstone is beyond question; the firm was actively soliciting firms to purchase its shock absorber at the time of the Monroe acquisition, I.D. 411. The availability of foreign firms, such as Armstrong and DeCarbon is less obvious, yet we believe that either of these firms in all likelihood could have been acquired by Tenneco, had Tenneco wished to undertake the more arduous and less certain competitive struggle which necessarily accompanies entry through a toehold acquisition. Rather than persuading us that Armstrong and DeCarbon were in fact unavailable, the record demonstrates only that Tenneco broke off negotiations with each firm once it had learned that a gap existed between the prices asked and offered.

In the case of Armstrong, a publicly traded company, the firm's management took the position in 1974 that it was not interested in being acquired at even a "normal premium" over the market price of the firm's stock. Tr. 2622–23. Management's position was that the firm's prospects were so bright that it would take a 100 percent premium to arouse their interest. But whether it would, in fact, have taken a premium of that size remained to be seen, given that the firm's share was widely held, Tr. 2639, and even management was constrained to admit that the Board of Directors would have had to recommend sale at an appropriate price. **[65]**

What had transpired, then, was little more than offer and counteroffer, accompanied by what appears to be some bluster and posturing by Armstrong. Such a course of events is to be expected in any negotiation, and by no means establishes that the target firm is, in fact, unavailable, especially given that Tenneco was the party which ceased negotiation.

To hold otherwise would, in essence, leave the government unable to challenge effectively the acquisition of major target market firms.

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[69] Gabriel's market share in 1962 was a matter of some dispute in this proceeding. *Compare, e.g.*, RAB at 23 *with* Tr. 10224–25. We find the most reasonable estimate of Gabriel's replacement market share at that time was that provided by Dr. Nelson, who believed it to have been in the 10 to 18 percent range. *See, e.g.*, Tr. 10224–25, 10230–31. This is considerably less than the market share which the Commission previously believed Gabriel to have held when it was acquired. *See, e.g.*, Tr. 10635, 10723.

To protect itself from exposure under Section 7, the well-counseled acquiring firm would need only to approach each toehold firm and engage in a round of negotiation, secure in the knowledge that the inevitable gap between offered and asked prices would insulate in from legal challenge and the eventual shock of a divesture order.

In this case, there is nothing which demonstrates that Tenneco's negotiations with Armstrong or others were sham,[70] but that does not end the matter. Even if numerous rounds of serious and committed bargaining had occurred, and some price gap remained, we would be most reluctant to conclude from that alone that the target firm was, in fact, "unavailable." What a firm is willing to offer, of course, is related to a number of factors, not the least of which would be whether better opportunities lay before it. Here, the acquisition of Monroe, with its already established 38 percent replacement market share, must surely have been seen by Tenneco as an alternative infinitely more attractive than the purchase of Armstrong. Tenneco would acquire, along with Armstrong, years of struggle to build market share, and the prospect of creating a market structure permanently more competitive than would exist if it could obtain Monroe. *See, The Stanley Works, supra,* 78 F.T.C. at 1072. **[66]**

We have little doubt that had Tenneco believed it could not, in fact, acquire Monroe, it would have successfully closed the gap in price[71] which separated it from Armstrong.[72] *See, The Bendix Corporation, supra,* 77 F.T.C. at 820. Accordingly, we find that the unavailability of Armstrong as well as DeCarbon,[73] and other firms,[74] has not been established.

Finally, there is no doubt that entry by Tenneco through either a toehold acquisition or a licensing arrangement would both decrease concentration and produce additional procompetitive effects. Al-

[70] There is, though, evidence that Tenneco was well aware that its acquisition of Monroe would result in a almost certain challenge by this agency, *see* discussion, *supra,* 38 n.33, and that this second round of talks with Armstrong occurred just prior to the Monroe acquisition.

[71] Nor is it the Commission's role to establish what that price would be. *See, British Oxygen Co. Ltd.,* 86 F.T.C. 1241, 357 (1975), *rev'd on other grounds, sub nom., BOC International, Ltd.* v. *FTC, supra.*

[72] Indeed, Tenneco instructed the president of Walker Europe to maintain "contact and relationship" with Mr. Hooper, the chairman and CEO of Armstrong, pending further orders from Tenneco. CX 85.

We also note that Tenneco did acquire Harmo, a British ESP firm, in 1975 after negotiations which resembled its talks with Armstrong. Tr. 10178, 11485. *See, also,* Tr. 11490, CX 230.

[73] The record demonstrates a pattern of offer and counter-offer with DeCarbon not unlike that which occurred with Armstrong, although DeCarbon and Tenneco appeared farther apart on price. CX 91–95. Like Armstrong, the DeCarbon negotiation was left open. CX 96.

We are unimpressed by respondent's assertions that the French government would block a DeCarbon acquisition. RPF 363. In fact, DeCarbon proposed a manner of sale to ease any governmental concern, CX 92D, and Tenneco had in 1976 acquired at least one French ESP firm, Bellanger. Tr. 11485. Indeed, Tenneco had demonstrated a facility for acquiring European ESP firms in the early and mid 1970's, purchasing firms in Sweden and Germany, as well as in Britain and France. *See, e.g.,* Tr. 11482–91.

[74] The record also identifies still other suitable foreign firms, but does not make clear whether any of those firms could, in fact, have been purchased. I.D. 414–27 and p. 119.

though little evidence demonstrating the probability [67]of such benefits is required when the market in question is oligopolistic,[75] and few markets would seem more oligopolistic than the one in question, *see* discussion, *supra,* 10–12, there is, in fact, an abundance of evidence pointing to the likely benefits to competition which would flow from alternative entry by Tenneco.

The strongest predictor of the likely impact of such entry is found in the strong defensive actions taken by the industry in response to the *threat* that Tenneco would enter. Tenneco was regarded both within and without the market as the firm most likely to attempt entry, and that perception was the likely trigger of a wave of procompetitive effects, including improved service, new product development, cost cutting, and price cutting. *See generally* discussion, *supra,* 45–57. Actual entry by Tenneco would certainly have continued and perhaps even intensified those salutary effects.

In addition, deconcentration was also likely, inasmuch as full utilization of an optimal MES plant would require something on the order of 10 percent of the replacement market, *supra,* 12, and we conclude that Tenneco, with all its capabilities, would achieve at least that volume and likely more. In such circumstances, deconcentration would likely occur.[76] [68]

Conclusion

As the previous discussion illustrates, the effect of this acquisition is likely to lessen competition substantially in the sale of replacement shock absorbers through the elimination of both perceived and actual potential competition, in violation of both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The necessary and appropriate remedy in such circumstances is complete divestiture of the stock and assets illegally acquired. *United States* v. *E.I. Dupont de Nemours & Co.,* 366 U.S. 316, 328–31 (1961); *Procter & Gamble Co.,* 63 F.T.C. 1465, 1584, (1963) *aff'd,* 386 U.S. 568 (1967). *See also, L.G. Balfour Co.,* 74 F.T.C. 345 (1968), *aff'd,* 442 F.2d 1 (7th Cir. 1971). Further, a ban on future acquisitions without prior Commission approval is often imposed to prevent repetition of the

[75] *See, e.g., BOC International* v. *FTC, supra,* 557 F.2d at 27 n.5, quoting Professor Turner:

[T]he problem of proving that the new entrant would have been a substantial competitive factor can be overstated. It is highly likely that a new entrant in . . . a tight oligopoly industry . . . will shake things up a great deal in the process of trying to acquire a substantial market share, even if in the end its inroads are rather modest. 78 Harv. L. Rev. at 1383.

[76] More precisely, deconcentration would necessarily follow unless the overall sales volume in this market were rapidly to double and redouble, rendering MES-level sales an insignificant percentage of the newly expanded market. Needless to say, we believe this latter scenario highly implausible, especially in the short run.

violation. *See, e.g., Liggett & Myers Inc.* 87 F.T.C. 1074 (1976), *aff'd,* 567 F.2d 1273 (4th Cir. 1977).

Accordingly, we order, as urged by Complaint Counsel, divestiture of Monroe and a 10-year moratorium on future acquisitions by Tenneco of any shock absorber firm without prior Commission approval. CCPF pp. 161–64.

We fail, however, to see the need for, and therefore the appropriateness of, additional order provisions also urged by Complaint Counsel. Complaint Counsel would further burden Tenneco with a requirement that it report, for a 10-year period, *any* acquisition and the product line involved. Such a requirement, however, would not serve to further fence-in respondent from another unlawful shock absorber acquisition; Paragraph V already sees to that. Moreover, even if we were to assume likely recidivism in other product lines, the provision would not by its after-the-fact reporting aid us in preventing future violations; the pre-merger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, provide sufficient advance warning of most significant acquisitions. Complaint Counsel would also have us order Monroe, once divested, to "resist" takeover attempts by any other ESP firm. Although the notion of a target market firm valiantly struggling to preserve potential competition is appealing, the enforceability of such a provision is doubtful at best, and we decline to adopt it. Finally, we decline to adopt the proposed 10-year moratorium on any acquisition by Monroe of an ESP firm, inasmuch as we did not reach that theory of violation.

Concurring Statement of Commissioner Clanton

I. Introduction

I fully support the Commission's decision in this matter, but I would like to elaborate further on some of the thorny issues associated with the potential competition doctrine. In particular, my focus concerns the feasibility and attractiveness of alternative means available to Tenneco by which to enter the independent shock absorber aftermarket, factors that help to establish Tenneco as an actual potential entrant. In light of findings by the administrative law judge and a district court judge that alternative entry routes were not available, it seems useful to compare the facts of this case with the evidentiary standard set forth in previous judicial precedents. The Commission's conclusions here with respect to alternative means of entry are not only reasonable but consistent with those precedents.

An important consideration in cases of this kind is the relative weight that should be assigned to various forms of objective and subjective evidence. My point in this regard is simply that in assessing the alleged elimination of potential competition, we are always dealing with probabilities and rarely, if ever, with certainties. These probabilities, such as the likelihood of entry by means other than the acquisition under consideration, are invariably difficult to pin down with concrete and certain proof. In weighing the evidence—both testimonial and objective—we must always take care to refrain from engaging in substantial speculation about a firm's plans for the future. On the other hand, the whole theory of potential competition becomes quite useless if we and the courts are required to find with relative certainty that an acquiring firm would enter the market by means other than the acquisition or the date by which such alternative entry is going to occur. Market dynamics and the vagaries of any corporation's own planning process will almost always preclude us from making such precise determinations. Areeda and Turner have recognized this characteristic of potential competition:

> Although we have criticized some decided cases which have not required much proof, truly satisfying proof cannot be demanded. To insist upon it would be virtually to abandon the effort to preserve potential entrants from elimination by merger. Abandonment, however, would be unwise in those situations where a highly concentrated market needs more competition and where potential entrants are few in number. With appropriate proof of such needs and numbers, . . . we see no alternative to rather modest proof that the defendant outside firm was a potential entrant. V. P. Areeda & D. Turner, *Antitrust Law* ¶1121e at 117 (1980). [2]

In some cases, the evidence provides fairly clear answers to the questions posed by the actual potential entrant theory. For example, in *Heublein, Inc., et al.,* 96 F.T.C. 385, 587 (1980), the Commission found that Heublein's experience in the marketing and distribution of other alcohol products, together with the experience of similarly situated firms, more than adequately supported the conclusion that it would have been within that firm's capacity to acquire and operate successfully a small wine company, even though we ultimately did not find liability against that actual potential entrant.[1] And, in *Brunswick Corp., et al.* 94 F.T.C. 1174, 1269–70 (1980), *modified as to relief,* 96 F.T.C. 151 (1980), *aff'd as modified sub nom. Brunswick Corp. v FTC,* No. 80–1913, and *Yamaha Motor Co., Ltd. v FTC,* No. 80–1760 (8th Cir. July 29, 1981), we found it unusually clear that the potential entrant possessed and was exploiting the technology

[1] It should be noted that in *Heublein* the facts also revealed with greater-than-usual clarity the substantial number of other potential entrants at the market's edge, which of course diminished the competitive importance of the loss of Heublein as one actual potential entrant. 96 F.T.C. at 589.

required to enter the relevant market; the entrant also was adept at marketing in areas distant from its production facilities, such as the relevant market. Similarly, in *Heublein,* we were able to judge with confidence that there were numerous smaller candidates available to the respondent for entry by toehold acquisition. 96 F.T.C. at 587–88. By contrast to these instances, the facts in other cases may not be as clear-cut, and a decision may often have to be made on the basis of inference from such evidence as company history or the experience of other firms in the market. But the fact that less-than-certain judgments must be made in the process of evaluating likely potential entry should not be fatal to the process or wholly determinative of the outcome.

In this case, the evidence of objective factors—including market compatibility, access to relevant technology, favorable and attractive market conditions and the availability of less anticompetitive entry vehicles—makes it quite reasonable to conclude that Tenneco would likely have entered the relevant market by alternative means.

II. Interest, Incentive and Feasibility of Entry

As the Commission's opinion notes, one of the key prerequisites to any finding of liability is to establish that a *reasonable probability* exists that the acquiring firm had means to enter, and would likely have entered, the relevant market other than through the challenged acquisition. *United States v Marine Bancorporation,* 418 U.S. 602, 633 (1974); *United States v Siemens Corp.,* 621 F.2d [3]499, 506–07 (2d Cir. 1980). In *Siemens,* the court relied upon the following factors to find that the defendant would probably *not* enter the market *de novo* or by toehold acquisition, even though it had both the interest and incentive to do so: Siemens lacked the technological competence to develop its own product, as evinced by the fact that it had tried and failed to achieve that objective; it faced a substantial time lag before reaching the market, even if it did have the technology to develop its own product; the defendant had missed the growth phase of the market and the profit prospects for the future in that market were not encouraging; and there was no offer of evidence of an attractive and available toehold. *Id.* at 507–08.

By contrast, the objective factors here support a reasonable probability that Tenneco would have entered by means other than this acquisition within a foreseeable period of time. Like Siemens, Tenneco has the interest and incentive to enter the shock absorber market, as the ALJ found, as the Commission's opinion details and as I describe below. Unlike Siemens, Tenneco possesses the techno-

logical capability to enter the market. Although Tenneco/Walker did not have all the required technology in hand, it was close to that stage and presumably could have licensed or acquired the remainder. It had experience in making jacks and tubes and had acquired proprietary technology in shock absorbers, through Triple S. Respondent also had an efficient distribution system compatible with shock absorbers and its own muffler shops—a form of retail outlet through which shock absorbers are often sold. This compatibility is seen in the fact that most of the major competitors of Walker and Monroe market both exhaust system parts and shock absorbers. Also, unlike Siemens, even though the profits in shock absorbers have declined from previous levels, the rewards to be gained from the shock absorber business are still attractive and are expected to remain so.

As mentioned above, the ALJ found that Tenneco had no plans to enter *de novo* and that no toeholds were available that would be viable alternative means of entry. Specifically, he found that while Tenneco was interested in acquiring Armstrong the interest was not mutual, that Tenneco and DeCarbon had failed to agree on a price, that Blackstone was unattractive, and that the status of "other" toeholds was "unclear." (I.D. 119) Also, in denying a preliminary injunction, a district court found insufficient and inconclusive showings on both the *de novo* entry prospects and toeholds. *FTC v Tenneco, Inc.*, 433 F. Supp. 105 (D.D.C. 1977). However, our own review of objective factors developed in this record leads us to a different conclusion. [4]

As the majority's opinion makes clear, prior to the acquisition of Monroe Tenneco had been exploring several different means of entering the shock absorber business. More specifically, it had explored licensing, development of proprietary technology and various acquisitions. Obviously, if each of these alternatives had led to a dead-end, we would be left with no choice but to permit the merger, but the evidence reveals something quite different from that. After surveying Tenneco's multiple and varied probes of the shock absorber market, it is reasonable to conclude that the firm intended to enter by some means, whether by *de novo* entry, toehold acquisition, licensing or even acquisition of a leading firm. Moreover, because of Tenneco's recent consideration of the time required for development of Armstrong and DeCarbon licenses and its probes of other acquisitions, probable entry seems more predictably immedi-

ate in this case than it has been in others. *Compare BOC International, Ltd. v FTC*, 557 F.2d 24, 29 (2d Cir. 1977).[2] In *BOC*, the court concluded that the Commission had found only that the respondent was likely to enter *eventually* with no indication as to what was meant by eventual entry. Here, by contrast, we have evidence of multiple negotiations with other firms regarding licenses and acquisition, plus the consummated acquisition of Triple S, all indicating a more immediate prospect of entry by Tenneco. Some further review of the evidence bearing on each of the elements of the actual potential competition doctrine will confirm this conclusion.

A. Interest and Market Attractiveness

A major argument of Tenneco is that it never seriously considered entering the shock absorber market by any means other than the Monroe acquisition. (RAB 14) Respondent emphasizes that no decision-making officials at Tenneco or Walker ever seriously considered any other method of entry, citing complaint counsel's own expert for the proposition that, at the very least, respondent did not exhibit an intention to enter absent acquisition of a license or a toehold. (RAB 15) In particular, Tenneco belittles its talks with other shock absorber firms prior to its negotiations with Monroe, including Armstrong, Tropic, Triple S and DeCarbon. (RAB 15–17) While some of those negotiations may not have proceeded to ripeness, and some of those firms or their assets ultimately may not have been available, these overtures belie the respondent's denial [5]of any interest in this business beyond its efforts to acquire Monroe. This conclusion is supported by the evidence of respondent's sustained and focused interest in shock absorbers over time; for example, there is the following observation of Mr. Cook, the president of Walker. Although made in conjunction with consideration of the Monroe acquisition proposal, these comments unmistakably exhibit Tenneco/Walker's strong prior interest in the shock absorber market:

> During the past reviews of Walker's five year plans, we have had discussions with the Tenneco Planning Department regarding potential new product lines that would most closely fit with our present exhaust business, and the answer has been collectively agreed to be shock absorbers. As is detailed in the preliminary background data attached, we believe the product line is the most compatible and is significant enough to justify pursuing. (CX 10A)

Respondent also argues that its interest in Monroe does not necessarily evince a general interest in other kinds of entry. (RAB

[2] In *Yamaha Motors Co. Ltd. v FTC*, the court of appeals did not attempt to determine precisely when Yamaha might have entered the market; it determined only that the showing of the time of likely entry was "considerably more definite than was the case in *BOC*." 1981–82 CCH Trade Case ¶64,202 at 73,729 n. 12 (8th Cir. July 29, 1981).

17–18) That may certainly be true in some instances, but, as we said in *Heublein,* 96 F.T.C. at 586, the fact that a firm says it will enter a market only by acquiring a particular firm should not be conclusive or highly probative, especially where there is other evidence of broader interest.[3] I agree with the majority that Tenneco exhibited such broader interest prior to its acquisition of Monroe.

Tenneco's general interest in shock absorbers has been stimulated and sustained by the special characteristics of its Walker Division that make shock absorbers the most logical line of products to add to its ESP lines. The majority's opinion describes in some detail the experience of Walker in the manufacture of steel tubing, a major input in shock absorber production (CX 4F), as well as its jack-manufacturing experience with hydraulic principles closely related to the design and construction of shock absorbers. In addition, the majority details Walker's distribution and marketing capabilities which afford peculiar economies in shipment and sales from the combination of ESP and shock absorbers. [6]Walker itself has recognized the special compatibility of these two lines of products. (See CX 10A). The similarity of these technologies is much greater than was the case in either *Siemens, United States v Black and Decker Mfg. Co.,* 430 F. Supp. 729 (D. Md. 1976), or *FTC v Atlantic Richfield Co.,* 549 F.2d 289 (4th Cir. 1977). The differences between Siemens' X-ray and computer tomography technology, on the one hand, and the technology required for entry into nuclear medical equipment created a wider chasm than exists here between ESP and shock absorbers. 621 F.2d at 507. And, in *Atlantic Richfield,* although Arco had experience in one narrow segment of the uranium market, the court found that it possessed none of the requisite expertise to make it a potential entrant into uranium extraction; the two diverse technologies were not regarded as similar or transferable. 549 F.2d at 299–300. Likewise, Black & Decker's experience in electric motors did not lend it the know-how required to enter gasoline engine production because, as the court noted, their design and development entailed different considerations. 430 F. Supp. at 758. Such is not the case here, as Tenneco itself recognized on several occasions, and it is quite reasonable to infer that respondent's experience with very compatible technology and mar-

[3] The court in *Siemens* said that the memoranda of a few lower-echelon employees of the defendant company who possessed no management responsibility could not suffice as evidence of corporate intent to enter a market, 621 F.2d at 508 (2d Cir. 1981). Furthermore, the views of those employees had not been brought to the attention of the decision-making management. In this case, however, there is sufficient involvement by the upper management of Tenneco and Walker to attribute the expressions of interest in shock absorbers found in Tenneco's documents directly to the decision makers.

keting methods positioned it well for—and heightened its interest in—entry into the shock absorber business.

The attractiveness of the relevant market also constitutes an important objective factor to be weighed in potential competition analysis. Such analysis involves not only profitability but projected market growth and other market trends indicating the long-term health or decline of a business. Such considerations have played a role in other decisions, including the recent *Siemens* decision, in which the court found that the alleged actual potential entrant had missed the phase of rapid growth in the market and that profitability had become, and would likely remain, low. 621 F.2d at 507. *See also United States v Wilson Sporting Goods Co.*, 288 F. Supp. 543, 553, 560 (D. Ill. 1968) (market growing rapidly and attractive for entry); *United States v Ford Motor Co.*, 286 F. Supp. 407, 439 (E.D. Mich. 1968) (rate of return apparently attractive but misleading); *United States v Standard Oil Co.* (NJ), 253 F. Supp. 196, 212 (D.N.J. 1966) (high profit and growing demand). In this case, however, such factors portray a different picture of the prospects for the shock absorber market and entrants seeking to enter it.

Respondent argues that the shock absorber market was stagnant from 1973–77 primarily because of the growth in demand for MacPherson struts and was unattractive to possible entrants because of the high minimum scale required for efficient production of shock absorbers. (RAB 10) While the barriers imposed by scale economies may be high, the evidence indicates that Tenneco is in a far better position than any other firm to achieve successful entry. Furthermore, while the profits in this market in recent years may be somewhat lower than they were previously, that is not enough to render the market unattractive for purposes of this analysis. As the ALJ notes, there is evidence that the decline in Monroe's profitability was temporary, resulting from internal problems, competition from Maremont and [7]conditions in foreign markets. (I.D.F. 200) Moreover, respondent's own forecasts prior to the merger indicate that the market is attractive and that Monroe's setback is only temporary. (I.D.F. 205) Although the profit margins in the market have become somewhat leaner and some firms have exited, the market is hardly in irreversible decline nor does it approximate the condition of the market in *Siemens*. While some weight would be given to changed market trends, these changes are not so significant as to justify a finding that the shock absorber market is unattractive. In fact, the departures from the market tend to show only that those

firms were not as well situated to thrive in the market as Tenneco/Walker.[4]

B. Feasible Means of Entry

The availability to Tenneco of feasible alternative means of entry is a critical issue here, and it played a principal role in the ALJ's and district court's findings in favor of respondent. The most likely alternatives available to respondent appear to be entry through a licensing arrangement or through acquisition of a toehold firm (*e.g.*, Armstrong, DeCarbon, or Blackstone). We must acknowledge that economies of scale may make entry by either licensing or expansion of a toehold more difficult, as the respondent argues. (RAB 26) Yet, to the extent that it exists, this difficulty was known to Tenneco and taken into account in its pre-merger evaluations of the shock absorber market. Some of the pre-merger documents involving the acquisition of Triple S indicate that Tenneco considered using that purchase as a springboard into the full-scale participation in shock absorber market. (CX 25Z–9) Throughout its period of exploration of shock absorbers, Tenneco also discussed production under a license as a possible option. Respondent specifically discussed licensing as well as acquisition with both Armstrong (CX 76) and DeCarbon (CX 297, 300, 303), and it seems quite clear that shock absorber production under a license was feasible. As the majority's opinion notes, the American shock absorber firm, Heckethorne, at the time of its purchase by Questor, produced under a license from DeCarbon. Additionally, an official of Armstrong, which licensed firms in many countries, testified that such licenses could be developed into full production in two years.

As for the availability and attractiveness of the toeholds, we place greater weight than the ALJ did on the extensive contacts and negotiations by Tenneco with various firms, ranging from Tropic and Triple S to Armstrong and DeCarbon. The ALJ's dismissal of the Armstrong and DeCarbon talks as futile and meaningless because of differences over price is not entirely persuasive. The reasonable inference to be drawn from these talks is that they were serious, that they proceeded and were maintained [8]over a period of time and that they were substantial exercises within the total context of Tenneco's multi-faceted exploration of the shock absorber business. Indeed, even after its initial round of discussions with Armstrong, which did not produce an agreement, Walker's president wanted to

[4] A variant of respondent's argument about the attractiveness of the market is that the market was performing so competitively that the potential competition doctrine is inapplicable. That issue will be discussed more fully below.

keep the lines of communication with Armstrong open for future development. The fact that certain negotiations were stalled over price differences is not necessarily dispositive. Obviously, respondents should not be required to pursue a futile exercise or accept an unreasonable offer. But the facts here do not reveal an impasse in negotiations between Tenneco/Walker and either Armstrong or DeCarbon. Rather, the evidence, based on Walker's own assessment indicates that the doors remained open for purchase of a viable toehold at the time Tenneco turned its attention to Monroe.

III. Fewness of Potential Entrants

As we noted in *Heublein*, although complaint counsel bear the ultimate burden of proof on the issue, it seems reasonable to ask the party defending the merger to come forward initially with evidence that "a group of plausibly qualified potential deconcentrators exists." 96 F.T.C. at 589. Respondent suggests that a large group of such entrants is sitting in the wings, citing the major auto companies and manufacturers of original equipment shock absorbers and other motor vehicle parts. Superficially, those firms might appear to have the capability to enter the independent aftermarket for shock absorbers. But complaint counsel have persuasively demonstrated, as both the ALJ and the Commission's opinion describe, that the characteristics of the shock absorber aftermarket—*e.g.*, inventory management, distribution, brand-name recognition, access to technology and scale economies—make entry difficult and severely limit the number of likely potential entrants into the market. Respondent acknowledges that entry barriers are high and argues on that basis that even Tenneco would not be able to enter the market successfully except by purchase of Monroe. However, as detailed previously, Tenneco clearly appears to be in the best position to enter by means other than the Monroe acquisition, and the exit of other auto parts producers from the market suggests that expertise in other automotive lines is not readily transferable to the independent aftermarket for shock absorbers.

IV. Likelihood of Deconcentration

The Supreme Court in *Marine Bancorporation* clearly suggested that the presumption of non-competitive market performance derived from high levels of concentration could be rebutted, citing *United States v General Dynamics Corp.*, 415 U.S. 486 (1974), a horizontal merger case wherein the court found that market shares based on the traditional measure of sales did not fully reflect

competitive conditions in the market. 418 U.S. at 631. Respondent claims to have overcome the presumption here by showing how intense competition has thinned profit margins. [9]More specifically, respondent offers the following evidence in support of its contention: (1) testimony of industry executives; (2) testimony of non-industry members as to unattractiveness of entering the market from a profit perspective; (3) documentary evidence showing declining rates of return; (4) evidence showing that shock absorber prices rose less rapidly than prices generally; and (5) "buyer power" exerted by large mass retailers such as Sears. (RAB 48–49)

As to the first two arguments, it appears difficult to place great weight on post-merger statements of "intense price competition" by industry representatives. If corroborated by other objective evidence, these statements might be given some credence, but it is hard to imagine any industry member admitting that his firm did not compete aggressively or that the industry was non-competitive. The statements by non-industry members about the attractiveness of the market are somewhat more credible, but the reasons advanced could as easily be attributable to the fact that those firms did not have the technical or marketing capability to enter the market. In other words, the very reasons why those firms are not likely entrants—and Tenneco is—provides an explanation for their view that the market did not offer attractive investment opportunities.

With respect to the third reason, the evidence of declining rates of return—especially Monroe's—does not necessarily suggest that those returns will inevitably remain low. For one thing, Tenneco's own pre-merger documents indicate that the market is attractive and that Monroe's problems are temporary:

> Generally, the industry growth pattern has been similar to exhaust: A long period of steady growth up to 1973, a drop in 1974, and a recovery in 1975–1976. (CX 5I)

> We strongly believe Monroe will rebound and again be a significant profit producer, particularly if they are combined with Walker. (CX 5D)

> We project the shock market to continue to grow and basically be a function of cars on the road, miles traveled, and overall economic conditions. (CX 5G)

An additional factor affecting Monroe's profitably was the more aggressive competition of the other industry leader, Maremont, in the early-to-mid-1970s. Although Maremont's actions reflect more competitive behavior, it is not at all clear that they signal the beginning of a long-term trend toward a fully competitive market. For one thing, Maremont may well have been responding, at least in part, to the threat of entry by Tenneco. For another, high entry

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barriers limit the prospects [10]that a rapid influx of new competitors will await those industry leaders who attempt to extract supracompetitive profits from the market. That is not to say that a highly concentrated industry having relatively high entry barriers cannot operate reasonably competitively. However, the evidence that such an occurrence is likely to exist and remain permanent should be fairly persuasive. In light of evidence that historical profits were above average, that the shock absorber market is not in an irreversible state of decline, that the structure of the market has not changed significantly over time and that Monroe's problems were temporary, it is difficult to conclude that the presumption created by the high concentration levels has been effectively rebutted.

The evidence on price trends is especially difficult to assess and, therefore, is less reliable as a measure of the degree of competition existing in the market. It simply does not reveal with any clarity the underlying causes of the pricing behavior or the likelihood that competitive pressures, to the extent they exist, are likely to have a dampening effect on prices in the future. It is possible, as respondent suggests, that the growth of Sears and other mass retailers has had some impact on prices. But even if we accept the notion that buyer power could be considered an effective antidote to seller market power, it is not at all clear that the mass retailer segment of the shock absorber aftermarket will serve as an effective check on the competitive behavior of industry leaders. As respondent acknowledges, even with the presence of Sears, the buyer market is still significantly less concentrated than is the seller side. Moreover, given the difficulty of entry into the manufacture of shock absorbers for the independent aftermarket, there are substantial constraints on the ability of buyers to integrate vertically upstream if prices at the seller level rise too far above the competitive ideal.

In short, the evidence offered by respondent is inadequate to counter the presumption arising from the high concentration figures. Industry returns may be somewhat lower than they were, but the downward pressures on profits and prices are not so strong or irreversible that we can assume that the market—notwithstanding the concentration levels—is reasonably competitive. [11]

V. Perceived Potential Competition

Finally, a brief word is in order about our finding that Tenneco was a perceived potential competitor. In making that finding, the Commission relied upon objective evidence, bolstered by consistent

subjective evidence and a consistent inference of present effect upon one of the existing firms, Maremont.

The objective evidence has been described in detail and needs no further mention. Objective evidence undoubtedly constitutes the best evidence of the perceptions of existing firms and, "[o]rdinarily the objective likelihood of the outside firm's future entry would also determine the perceptions of existing firms." *Id.* ¶1122c at 119. As for the subjective evidence, which consists of the testimony of competitors as to their perceptions of Tenneco's entry potential it is wise to heed the advice that "subjective evidence from existing firms must be heavily discounted." V. P. Areeda & D. Turner, *Antitrust Law* ¶1122d at 120 (1980). Subjective evidence can be helpful, however, as confirmatory evidence, so long as its limitations are clearly understood. Here, those subjective perceptions are in line with the objective factors to which we have devoted so much care. In addition, the observed behavior of Maremont during the time of Tenneco's most active efforts to enter the shock absorber market is consistent with the other evidence of an edge effect. While Maremont may have also been responding to other market conditions, its conduct is quite consistent with a perception of Tenneco as a likely potential entrant.

Furthermore, it is useful to note that Maremont's behavior, in light of the other evidence, is perhaps as close as we may get in most cases to direct evidence of an edge effect. We cannot trace, with absolute certainty, Maremont's every action directly back to its apprehension about Tenneco, but the "something more" that would be required to do that—such as a pre-litigation document from the files of a high executive of an existing firm identifying the presence of the potential entrant as the cause for its efforts to discourage entry—will rarely be available. The problem of proof, of course, does not justify making speculative guesses about the market's likely reaction to potential new entry. The evidence here, however, taken as a whole warrants the reasonable inference that existing firms were aware of Tenneco's efforts to enter and reacted accordingly. [12]

VI. Conclusion

To summarize briefly, I support the Commission's decision. The facts before us point inexorably toward the conclusion that the various elements of the potential competition doctrine have been satisfied. While the evidence in cases of this kind is always subject to

some uncertainty, I believe our findings are fully supportable and in harmony with relevant judicial precedent.

Final Order

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to reverse in part the initial decision:

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent it is inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to divest be, and it hereby is, entered:

I

It is ordered, That respondent, Tenneco, Inc. (hereinafter "Tenneco"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all stock, assets, title, properties, interest, rights and privileges, of whatever nature, tangible [2]and intangible, including without limitation all buildings, machinery, equipment, raw material reserves, inventory, customer lists, trade names, trademarks, and other property of whatever description acquired by Tenneco as a result of its acquisition of Monroe Auto Equipment Company (hereinafter "Monroe") together with all additions and improvements to Monroe subsequent to the acquisition. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the service of this Order, and shall be subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That such divestiture shall be accomplished absolutely to an acquirer approved in advance by the Federal Trade Commission so as to transfer Monroe as a going business and a viable, competitive, independent concern.

III

It is further ordered, That pending any divestiture required by this Order, respondent shall not knowingly cause or permit the deterioration of the assets and properties specified in Paragraph I in a manner that impairs the marketability of any such assets and properties. Respondent may but shall not be required to make capital expenditures for the improvement of any such assets and properties.

IV

It is further ordered, That pursuant to the requirements of Paragraph I, none of the stock, assets, properties, rights, privileges and interests of whatever nature, tangible or intangible, acquired or added by Tenneco, shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of Tenneco or anyone who owns or controls, directly or indirectly more than one (1) percent of the outstanding shares of the capital stock of Tenneco or to anyone who is not approved in advance by the Federal Trade Commission.

V

It is further ordered, That for a period of ten (10) years from the date this Order becomes final, Tenneco shall cease and desist from acquiring, or acquiring and holding, directly or indirectly, through subsidiaries or otherwise, without the [3]prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any concern, corporate or noncorporate, engaged in the business of manufacturing, distributing, or selling, shock absorbers, nor shall Tenneco for a period of ten (10) years from the date this Order becomes final enter into any agreement, understanding or arrangement with any such concern by which Tenneco obtains the market share, in whole or in part, of such concern in the above described product lines, without the prior approval of the Federal Trade Commission.

VI

It is further ordered, That within sixty (60) days from the effective date of this Order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this Order, Tenneco shall submit

a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Tenneco to make public its desire to divest Monroe, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said diverstiture.

VII

It is further ordered, That Tenneco shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this Order shall be binding on any such successor.

IN THE MATTER OF

THE KROGER COMPANY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9102. Complaint, July 1, 1977—Final Order, Sept. 25, 1981

This order requires, among other things, a Cincinnati, Ohio, operator of a major retail food chain to cease advertising survey-based food price comparisons which refer to any geographic area or competitor unless the survey that forms the basis for such claims is designed and executed in a competent and reliable manner. The company is required to ensure that employees responsible for pricing merchandise are not aware of the items selected for the survey prior to its completion, and that items to be surveyed be selected either randomly or using a representative sample of the products to be covered by the ad claims.

Appearances

For the Commission: *Eddie Correia, Paul Eyre, William Jacobs, Noble Jones,* and *Willie L. Greene.*

For the respondent: *Stuart J. Land, Melvin Spaeth, Kenneth A. Letzler, Robert S. Thorpe, James A. Beat, Jerold M. Block,* and *Vicki J. Divoll, Arnold & Porter,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Kroger Company, a corporation, respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Respondent is an Ohio corporation with its principal office at 1014 Vine St., Cincinnati, Ohio.

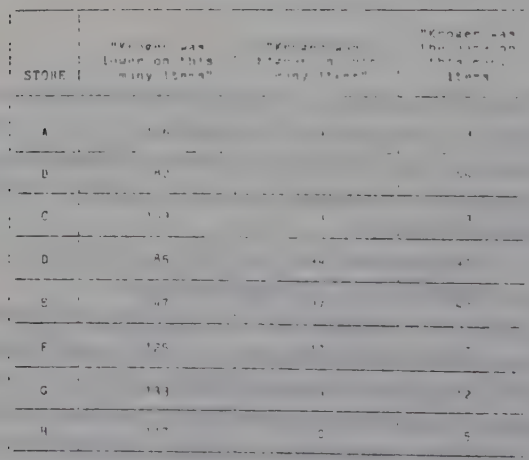
PAR. 2. Respondent, through its wholly-owned subsidiaries, is engaged in the operation of approximately 1,250 retail food stores in 20 states. In 1975, respondent ranked third in terms of sales in the United States among companies operating retail food stores. In the operation of these stores, respondent sells an extensive line of items, including food, groceries, and other merchandise. Respondent causes said items to be transported from its places of business in various States of the United States to its stores located in various other States of the United States. **[2]**

PAR. 3. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in the production,

processing, distribution, advertising, and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent has been, and is now, conducting an advertising program known as the Kroger Price Patrol in or affecting commerce, as commerce is defined in the Federal Trade Commission Act.

PAR. 4. As part of its advertising program, respondent is, and has been, engaged in advertising results of price surveys generally represented to the consumer as the "Kroger Price Patrol." The Price Patrol compares, on a weekly basis, the prices of the products of respondent's competitors with respondent's stated prices for approximately one hundred fifty (150) items. The results of this comparison are advertised in the format of tables reflecting the number of respondent's prices which are "lower than," "higher than," or "the same as" the competitors' prices.

Typical of the substance of these tables is the following: [3]



PAR. 5. Through the use of Price Patrol advertisements, respondent has made, and is now making, statements with regard to the Price Patrol Survey and the Survey results which accompany the tables described in Paragraph Four. Among said statements are the following:

Kroger is the Low Price Leader! The Price Patrol Proves It.

The Price Patrol Proves You Save More at Kroger. [4]

Documented Proof: Kroger Leads in Lower Prices!

Price Patrol Proof, Kroger Leads with Low Prices.

Shopping at Kroger will enable you to spend less for your food than at any other store.

PAR. 6. By the use of the tables described in Paragraph Four and the statements described in Paragraph Five, and others of similar meaning, respondent has represented, directly or by implication, that:

A. The Price Patrol Survey is a methodologically sound survey.

B. The results of the Price Patrol Survey prove that most items in respondent's stores are priced lower than in competitors' stores.

C. The results of the Price Patrol Survey prove that shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures.

D. The results of the Price Patrol Survey prove that the amount of savings in overall expenditures by shopping at Kroger is directly related to Kroger's relative performance on the Survey. [5]

PAR. 7. In fact:

A. The Price Patrol Survey is not a methodologically sound survey.

B. The results of the Price Patrol Survey do not prove that most items in respondent's stores are priced lower than in competitors' stores.

C. The results of the Price Patrol Survey do not prove that shopping at Kroger rather than at competitors' stores will result in lower overall expenditures.

D. The results of the Price Patrol Survey do not prove that the amount of savings in overall expenditures by shopping at Kroger is directly related to Kroger's relative performance on the Survey.

Therefore, the tables, statements and representations set forth in Paragraphs Four, Five and Six were, and are, unfair and deceptive practices.

PAR. 8. The advertising statements described in Paragraph Five, and the tables described in Paragraph Four, and others of similar meaning, represent, directly or by implication, that shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures.

PAR. 9. At the time respondent made the representations alleged in Paragraph Eight, it did not possess and rely on a reasonable basis for the representations. Therefore, the said advertisements are deceptive or unfair. **[6]**

PAR. 10. The advertising statements described in Paragraph Five, and the tables described in Paragraph Four, represent, directly or by implication, that at the time respondent made the representations alleged in Paragraph Eight, it possessed and relied on a reasonable basis for those representations, whereas in truth and in fact respondent did not possess and rely on a reasonable basis for said representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 11. In the course and conduct of its Price Patrol advertising program, respondent has engaged in the following additional unfair and deceptive practices: respondent's Price Patrol advertisements fail to disclose that meat, produce, and house brands are not included in respondent's Price Patrol Survey.

Thus, respondent has failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration to purchase respondent's items. Therefore, these practices were, and are, unfair and deceptive practices.

PAR. 12. The use by respondent of the aforesaid deceptive and unfair practices has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the purchase of substantial quantities of respondent's items. Therefore, these practices were and are to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

Initial Decision by

Montgomery K. Hyun, Administrative Law Judge

June 11, 1979

Preliminary Statement

On June 28, 1977, the Federal Trade Commission ("Commission") issued a Complaint, charging The Kroger Company ("Kroger" or "respondent") with unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) in connection with certain advertising claims made in the retail sales of food products (the so-called "Price Patrol" advertisements). By Answer dated August 24, 1977, as amended by Order Granting In Part Respondent's Motion For Leave To Amend And Denying Respondent's Application For A Determination Permitting Interlocutory Appeal, dated November 15, 1977, respondent denied that it had violated the Federal Trade Commission Act as charged and interposed certain affirmative defenses. By Order Ruling On Complaint Counsel's Motion For [2]Summary Decision, dated May 17, 1978 (hereinafter sometimes referred to as "the Summary Decision Order"), and issued after oral argument, the administrative law judge determined that respondent had made certain representations in its Price Patrol advertisements as alleged in Paragraph Six A, B and C and Paragraph Eight of the Complaint. The parties were allowed extensive pretrial discovery. Prehearing conferences were held from time to time in order to simplify the issues, to resolve disputes related to discovery and generally to expedite the trial preparation of the parties. Two separate attempts at reaching a mutually acceptable consent order agreement undertaken in 1978 under my urging were unsuccessful. Evidentiary hearings were held from July 17 to July 25, 1978, in Washington, D.C., for complaint counsel's case-in-chief with respect to the remaining issues, including the issues of reasonable basis, disclosure of material facts and relief. Defense hearings were held from February 5 to February 15, 1979 in Washington, D.C. The parties filed proposed findings, conclusions of fact and law, and proposed order, together with supporting briefs, on April 10, 1979 and answers on April 25, 1979.

The proposed findings, conclusions and orders of the parties and their arguments in support thereof have been given careful consideration and to the extent not adopted by this Initial Decision, in the form proposed or in substance, are rejected as not supported by the evidence, irrelevant or as immaterial. Any motion appearing on the

record not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

Upon consideration of the entire record in this proceeding and having observed the demeanor of the witnesses, I make the following findings of fact and conclusions of law and order, based on the record considered as a whole:[1] [3]

Findings of Fact

I. Introduction

A. *Identity of Respondent and the Nature of Its Business*

1. The Kroger Company ("Kroger") is an Ohio corporation with its principal office at 1014 Vine St., Cincinnati, Ohio (Comp. ¶ 1, Ans. ¶ 1).

2. Kroger is engaged in the operation of approximately 1,170 retail food stores in 20 states. Kroger sells items commonly sold in such stores. Some of these items have been transported from Kroger's places of business in various States to some of Kroger's stores located in various other States of the United States. Kroger has been ranked third in terms of sales in the United States among companies operating retail food stores (Ans. ¶ 2).

3. Kroger maintains, and at all times relevant to this proceeding has maintained, a substantial course of trade in the production, processing, distribution, advertising, and sale of items commonly sold in retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Comp. ¶ 3; Ans. ¶ 2; Ans. ¶ 3).

4. Kroger divides its retail food operations into Kroger Market-

[1] For the purposes of this Initial Decision, the following abbreviations were used:

F.	–	Findings of Fact in this Initial Decision.
CPF	–	Complaint counsel's Proposed Findings.
CPRF	–	Complaint counsel's Proposed Reply Findings.
RPF	–	Respondent's Proposed Findings.
Tr.	–	Transcript of hearings, sometimes preceded by the name of the witness.
CX	–	Complaint counsel's documentary exhibit.
RX	–	Respondent's documentary exhibit.
JX	–	Joint exhibit.
Comp.	–	Complaint.
Ans.	–	Respondent's Answer to the Complaint.
Summary		Decision - Order Ruling On Complaint Counsel's Motion For Summary Decision, dated May 17, 1978 (hereinafter sometimes referred to as "the Summary Decision Order").

ing Areas ("KMAs"). There are 13 KMAs across the country: Central, Cincinnati, Columbus, Dallas, Delta, Erie, Gateway, Houston, Los Angeles, Louisville, Michigan, Mid-Atlantic, and Southland (CX 1–1; JX 1: Pellin, p. 4; JX 1: Crague, pp. 3–4).

5. [See *In Camera* Findings]

6. Kroger has conducted an advertising program, known as the Price Patrol, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Ans. ¶ 3).

B. *Expert Witnesses*

7. Dr. Frank Kohout testified as complaint counsel's expert on survey methodology. Dr. Kohout is an Associate [4]Professor at the Department of Sociology, University of Iowa. Dr. Kohout holds a Ph.D. in sociology from Case Western Reserve University, Cleveland, Ohio. Dr. Kohout has published numerous articles in learned journals and has presented papers before recognized professional societies regarding survey design and statistical methodology (CX 707). He has published a book on introductory statistics, entitled *Statistics for Social Scientists,* designed to be used for either advanced undergraduates or for beginning graduate students (CX 707–3; Tr. 1002). In addition, he has written three chapters on statistics for a book called *Statistical Package for the Social Science* (Tr. 1001–02). Dr. Kohout also serves as a reviewer of articles published in recognized professional journals, including the *American Sociological Review, Sociological Quarterly,* and *Sociological Focus,* and in a specialized journal called *Symbolic Interaction.* From time to time, Dr. Kohout has reviewed books for publishers (Tr. 997; CX 707). Dr. Kohout has performed consulting duties on research design, measurement, and statistics for a research firm, and has consulted for a number of manufacturers, state and federal agencies, and for a federally funded research project (CX 707; Tr. 998). In his current position, Dr. Kohout teaches graduate-level courses in statistics and research methods (CX 707). He is a member of M.A. and Ph.D. review boards at the Department of Sociology, University of Iowa, and is responsible for advising advanced-degree candidates with regard to survey design and statistical methodology (Tr. 997). Dr. Kohout was qualified, without objection, as an expert witness in the areas of research methodology, including survey design and applied statistics (Tr. 1002).

8. Dr. Robert Kleyle testified as complaint counsel's expert on statistical methods and their application. Dr. Kleyle is an Associate Professor of Mathematics and Statistics at Indiana Purdue University in Indianapolis. He has held that position for five years. Prior to

his appointment at Purdue, Dr. Kleyle was employed for 6 years as an Assistant Professor at the University of Massachusetts in Amherst, Massachusetts. Prior thereto, he was employed at Simmons College in Boston as a part-time instructor (Tr. 582). Dr. Kleyle holds his Ph.D. degree from Harvard University in statistics. The subject of his doctoral dissertation was the area and foundation of statistical inference (Tr. 583). Dr. Kleyle's current duties at Indiana Purdue University are primarily teaching. He is involved in [5] research in statistical methodology and, to a large extent, is involved in consulting, both within and outside of the University. He also teaches courses in mathematics, probability, and advanced statistics (Tr. 583–84). Dr. Kleyle has three publications in the general area of foundations of statistical inference. The first two publications appeared in the *Annals of Mathematics Statistics,* and the third in the *Annals of Statistics.* He has published a paper on statistical inference for census data in *Communications in Statistics,* another paper in the *Journal of Quality Technology,* dealing with a maintainability test plan, and still another paper in the I.E.E.E. *Transactions on Reliability* (Institute of Electrical and Electronic Engineers), a reliability theory journal (Tr. 585). Dr. Kleyle was qualified as an expert witness in the application of statistical techniques to analysis of data, including the use of Chi-square analysis and the use of general statistical inferences in research methodology (Tr. 586–87).

9. Mr. Lloyd Oliver testified as respondent's expert on survey methodology and certain effects of price advertising. Mr. Oliver is Vice President of Glassman-Oliver Economic Consultants, Inc., Washington, D.C. (Tr. 2486). Mr. Oliver has a B.A. degree, with a major in economics (Tr. 2490–91). Mr. Oliver completed graduate courses for an M.A. in economics in 1972, but has not completed his thesis and has not received his master's degree (Tr. 2491, 2540). Mr. Oliver received a law degree from American University in 1975 (Tr. 2491). Mr. Oliver was employed, for more than five and one-half years, by the Federal Trade Commission as a staff economist in the Bureau of Economics. Mr. Oliver served as Deputy Assistant Director of that Bureau for approximately one year, and left the Commission in 1976 (Tr. 2493). While at the Commission, Mr. Oliver also worked as lead staff economist in matters involving survey methodology and design and matters involving the economic effect of trade restraints (Tr. 2527–33). Mr. Oliver has no publication in any recognized professional economic journal requiring peer review (see, Respondent's Pretrial Memorandum, dated December 22, 1978). Mr. Oliver has not served in an editorial capacity, or as an official referee or reviewer of articles submitted for publication, for any professional

economic journal (Tr. 2539). His statistical course work is limited to three statistics courses at the undergraduate level [6](Tr. 2542). Mr. Oliver has not taught any courses in statistics or survey design (Tr. 2541), and has not designed any retail food price survey (Tr. 2547). Mr. Oliver has not conducted any studies of the relationship between substantiation requirements and the behavior of firms (Tr. 2552). Mr. Oliver was not involved in any matters, while employed at the Federal Trade Commission, in which retail food advertising was the primary issue (Tr. 2547–49). Mr. Oliver was qualified as an expert witness with regard to survey methodology and the effects of advertising in the retail food industry (Tr. 2555).

10. Dr. Lee Benham testified extensively as respondent's expert on survey methodology and likely economic effect of the relief sought by complaint counsel. Dr. Benham is an Associate Professor of Economics, Washington University, St. Louis, Missouri and holds a Ph.D. in economics from Stanford University (Tr. 2797–98). He currently teaches courses in labor economics, basic price theory, medical economics, and industrial organization (Tr. 2798–99). Dr. Benham has published 12 to 15 articles in recognized professional journals in the area of economics (Tr. 2799), and has served as a reviewer of articles for professional journals (Tr. 2801). Dr. Benham has been employed as an economic consultant in a number of governmental and private industry matters (Tr. 2801). In particular, he has served as a consultant and expert witness for the Federal Trade Commission in the eyeglass advertising proceeding which resulted in a trade regulation rule limiting the extent to which trade associations and state legislatures may restrict the flow of commercial information in the retail eyeglass industry. The Rule also places limits on disclosure requirements for eyeglass advertisements (Tr. 2803–08). Dr. Benham's work has been relied upon by the FTC in its regulation on eyeglass advertising, 43 FR 23992, 23995 (1978), and in public statements (Tr. 2808–10). Dr. Benham's work has also been cited with approval by the Supreme Court. *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 377 (1977); *Friedman* v. *Rogers,* 47 U.S.L.W. 4151, 4157 (1979) (Blackmun, J. dissenting). Dr. Benham, however, has never undertaken any study of any aspect of the retail food industry (Tr. 2815), nor of comparative price advertising (Tr. 2817–18).

C. *Certain Kroger Personnel*

11. Thomas M. Vaughn is Kroger's Director of Meat Procurement. He was employed by Kroger on a part-time basis in the early 1950's and continued on a part-time basis until [7]completion of his

formal education in the early 1960's, when he was hired on a full-time basis for various assignments in stores, store management work. Sometime in the early 1960's, he was assigned to Kroger's Cincinnati Division Office as Meat Sales Promoter (Tr. 1882–85).

12. Dr. Richard Bere is the Vice President of the Columbus Marketing Area. Dr. Bere was employed by Kroger in 1957 as store manager, and became assistant buyer in the produce department. He later became a field specialist in fruits and vegetables, working with various stores, with the produce managers or running the departments. He was appointed Produce Merchandiser, Minnesota Division, in 1962, where he remained until 1965. He was then transferred to the Grand Rapids Division. From Grand Rapids, Dr. Bere was transferred to the Cleveland Division as Produce Merchandiser for 86 or 88 stores. While in the Cleveland Division, he became Director of Merchandising and held that position for two years. Dr. Bere was then transferred to Kroger's General Office as a consultant, reporting to the Vice President, Produce Merchandising for Kroger. He remained in that position for a year until he was appointed Vice President of Produce Merchandising in 1972. In the fall of 1977, Dr. Bere was transferred to the Columbus Marketing Area as Vice President of the Columbus Marketing Area (Tr. 1961–65).

13. Charles L. Thomas, Jr. is a Group Vice President of the Kroger Company, responsible for the supervision of 7 of the 14 KMAs. Mr. Thomas has been employed by Kroger for 28 years. Prior to his current position, which he has occupied for approximately one year and two months, Mr. Thomas was the Vice President of the Southland Marketing Area, headquartered in Nashville, Tennessee, for approximately two years. Prior to that, he was Vice President of the Atlanta Division, and held that position for about four years. Prior to that time, he was Vice President of Grocery Merchandising and Procurement for Kroger. He also had held the positions of Grocery Merchandiser for the Atlanta Division; Grocery Sales Manager; Assistant Buyer; and Floor Manager of the Cincinnati Division (Tr. 2093–A, 2093–B).

14. Dean A. Hicks is the Vice President of Marketing Administration for Kroger. He is responsible for the review of policies and procedures and for recommending and implementing changes for those policies and procedures that tend to cross the lines of authority of the four merchandising departments. Mr. Hicks is responsible for monitoring Kroger's compliance with the Federal Trade Commission order regarding advertised product availability and pricing. He is responsible for merchandising research and development, [8]packag-

ing research and development, and the design and implementation of the Universal Product Code (Tr. 2306–07). Mr. Hicks was directly involved in developing and writing the Everyday Low Price Policy ("EDLP") for Kroger (Tr. 2312). He also has the primary responsibility for the Burgoyne Checks (Tr. 2426).

15. Kenton A. Gast is a Director of Grocery Procurement at Kroger, and has held that position for 6 ½ years. He has been employed by Kroger for just under 29 years. He started at Kroger in 1954 as a management trainee. He then became a store company manager for about a year and a half. His next positions were produce trainee, produce field representative, field representative, and buyer trainee. These positions covered a period of about three or four years. Then he was a produce buyer for two years, and served as Assistant Merchandiser in Grocery, Grocery Buyer-Merchandiser for two years. Mr. Gast was then transferred to Cincinnati as a field manager, and, about three years later, went to the General Office, Grocery Merchandising, where he worked for about five years (Tr. 2173–74).

16. Ted R. Hoover is the Vice President of Sales and Operations for Rabold Brokerage Company, Incorporated. Prior to his current employment, Mr. Hoover was employed by Kroger for 23 years, from 1953 to September 1977. At Kroger, Mr. Hoover's last position was Grocery Merchandiser, from 1970 until 1977. The Grocery Merchandising Department is responsible for buying grocery products, designing sales programs for grocery items, and setting retail grocery prices (JX 2: Hoover, pp. 113–14). Prior to that, in 1970, Mr. Hoover was Grocery Merchandiser in Grand Rapids for Kroger for about a year and a half. Mr. Hoover has also held positions as Grocery Merchandiser in Minneapolis, Assistant Merchandiser in Little Rock, merchandising representative, store manager, head stock clerk, store manager trainee, and a clerk in the store (Tr. 1560–62).

17. Alan Joseph Stec is Advertising and Sales Promotion Manager for Kroger in the Southland Marketing Area. He has been employed by Kroger for 13 years. Mr. Stec has held the positions of Advertising Manager for the Little Rock Division, Advertising Assistant Manager for the Atlanta Area, Advertising Assistant in Grand Rapids, Advertising Assistant in the Chicago Division, Relief Store Manager in the Chicago Division, co-manager, and trainee (Tr. 1692–93). In his present position, Mr. Stec is responsible for all the advertising in the Southland KMA, except to the extent that certain responsibilities have been delegated to Campbell-Mithun, Inc., an advertising agency (CXs 4–5, 5–6). He evaluates all advertising and

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recommends to the management group advertising procedures and techniques (Tr. 1692–94). **[9]**

18. Robert Pellin is a Grocery Merchandiser for Kroger in the Central Marketing Area. His duties are to generate the sales and the necessary gross profits according to Kroger's Marketing Area objectives, and to direct these operations. Prior to his current position, Mr. Pellin was the Assistant Grocery Merchandiser for the Central Marketing Area. He had also worked in the Central Marketing Area, in the Peoria Division, at Market Basket, and before that at Kroger's St. Louis Division, now called the Gateway Marketing Area (JX 1: Pellin, pp. 3–5).

19. Harry McDaniels is the Advertising Manager for the Central Marketing Area. He has held that position for about eight years. He has been employed by Kroger for 27 years. As Advertising Manager, Mr. McDaniels is responsible for all advertising, including newspaper advertising and radio and television commercials. He supervises the activities of the advertising programs (JX 1: McDaniels, pp. 2–3; CXs 4–5, 5–6).

20. Charles R. Crague is a Director of Merchandising for the Gateway Marketing Area. He has worked for Kroger for 25 years. Mr. Crague started out as a trainee, co-manager, store manager, zone manager, produce merchandising representative, assistant grocery buyer, grocery buyer, grocery sales promoter, and grocery merchandiser. He has also worked as Manager of Operations, Merchandise Manager, Director of Sales for Grocery, and Director of Merchandising of the Gateway Marketing Area. As Director of Merchandising for the Gateway Marketing Area, Mr. Crague is responsible for the supervision of five departments within the region. These departments are: Advertising, Grocery, Produce, Meat, and Delicatessen (JX 1: Crague, pp. 3–5).

21. David Charles Ticeson is a Senior Analyst in the Marketing and Administration Office in Kroger's General Offices and was responsible for the scheduling, coordination, and tabulation of the Burgoyne Checks (JX 2: Ticeson, p. 60).

22. Arthur L. Ferguson, Esq. is in-house counsel for Kroger (Tr. 739). G. Leonard, Esq. is a member of Kroger's Legal Department (Tr. 739–40). F. Leland Davis is the Vice President of Advertising for Kroger's General Headquarters Office (CX 2–1). C. Ohlinger is the Manager of Consumer Research in Kroger's Headquarters Office (CX 2–1). James A. LeRoy is the Vice President of the Delta Marketing Area (CX 2–2). James M. Boswell is the Director of Merchandising for the Delta Marketing Area (CX 2–2). Edwin A. Schuler is the Grocery Merchandiser for the Delta Marketing Area (CX 2–2). **[10]**

W. Robert Knight is the Advertising Manager for the Delta Marketing Area (CX 2–2). B. G. Beaty is the KMA Vice President for the Central Marketing Area (CX 2–2). A. Wayne Smith was the Director of Merchandising until February 16, 1976 (CX 2–2). Newton Briggs is the KMA Vice President for the Dallas Marketing Area (CX 2–4; Tr. 745). Jack Davis was the KMA Vice President for the Southland Marketing Area until June 1, 1975 (CX 2–5).

23. L. Hollin was employed by Kroger's General Office in the Advertising Department (Tr. 740). Tom Brand was a Kroger store manager in Dallas during July 1975 to June 1976 (Tr. 740). George Robinson is employed in Advertising at Kroger's General Office Headquarters in Cincinnati, Ohio (Tr. 741). Leland Carawan was an Assistant Advertising Manager at Kroger in Nashville (Tr. 742–43).

24. Bob Crow was first a Grocery Merchandiser, and became Director of Operations in Dallas (Tr. 743). Bennett Hudson was Regional Vice President for the Dallas Marketing Area (Tr. 743–44). Larry Turney was the Public Relations Manager for Kroger in the Dallas Marketing Area (Tr. 744). Earl Blackshire was the Assistant Grocery Merchandiser for Kroger in the Dallas Marketing Area (Tr. 744). Russ Thorburn was the Assistant Advertising Manager for Kroger in the Central Marketing Area (Tr. 744). Bob Bachleda is the Grocery Buyer for the Central Marketing Area (Tr. 745–46). Tom Robins, also known as "Robbie" was the Assistant Grocery Merchandiser for the Central Marketing Area (Tr. 746).

D. *Certain Employees of Campbell-Mithun, Inc.*

25. Marvin Goldsmith is the Vice President of Campbell-Mithun, Inc., and advertising agency (Tr. 740). John Kroenig is an account executive at Campbell-Mithun (Tr. 740). Gordie Krimstein is employed by Campbell-Mithun in the Creative Department (Tr. 741). Dave Carter is Kroger Account Executive (Tr. 741–42). Marty Chasen was a Kroger Account Executive (Tr. 742). Bill Stein was a Campbell-Mithun employee (Tr. 742).

E. *Miscellaneous General Findings*

26. CX 16, entitled "Managing A Kroger Price Patrol Program," dated April 14, 1975, is a document written by Mr. Al Stec, Advertising Manager of the Southland Marketing Area, in conjunction with two advertising consultants in Kroger's headquarters (Tr. 1815). It was disseminated [11]to the KMAs as an information guide should the KMAs decide to enter a Price Patrol Program (Tr. 1814–15; CXs 5–5, 73). The document sets forth the details of how to put

together, run and manage a Price Patrol campaign (Tr. 760). CX 16 was disseminated through Kroger's advertising agency, Campbell-Mithun (JX 1: Pellin, p. 11).

27. CX 15 is a document entitled "The Price Patrol" (JX 1: Pellin, p. 11). It was sent to all operating divisions by the Kroger headquarters, explaining to them how the Price Patrol works and what the Price Patrol Program was (Tr. 1674–75; JX 1: Pellin, pp. 10–11). CX 15 contained such materials and information from other Kroger regions as sales charts, and how they progressed as they got into the program itself. CX 15 was put together by the Merchandising Department under the supervision of Charles Crague (JX 1: Pellin, p. 11). The document was written to be used as a means of communicating with merchandisers in the field on the basic merchandising philosophy of Kroger (JX 1: Crague, pp. 11–12). It was put together for the purpose of setting down and discussing face-to-face with individuals the merchandising philosophy of the company and how the Price Patrol fit in with Kroger's total merchandising philosophy (JX 1: Crague, p. 21). (References in Mr. Crague's testimony to Commission Exhibit 1 relate to CX 15. See, Tr. 305–08.)

II. Some Salient Aspects Of Kroger Retail Food Stores And Their Operation

A. *Composition of Kroger Retail Food Stores*

28. Kroger divides the items sold in its retail food stores into four general product categories: Grocery, Meat, Produce, and Delicatessen (JX 1: Pellin, p. 41; CXs 4–3, 8–2). A "grocery" or "commodity" item includes every item in the store that is not meat, produce, or delicatessen (JX 1: Pellin, p. 41; Tr. 737). "Produce" includes everything sold in the Produce Department, primarily fresh fruits and vegetables (Tr. 1965). "Fresh meat" includes meat items which have neither been frozen nor processed by curing or smoking, or some further process, such as fresh beef, fresh pork, fresh poultry, fresh lamb, and fresh veal (Tr. 1886). "Private label" is defined by Kroger as a brand which can only be sold within a company. For example, a Kroger label on an item is a Kroger private label item (Tr. 2175). The technical or trade use of the word "grocery" interchangeably with "commodity" to exclude meat and produce is not in accord [12]with the common sense understanding of "grocery," which includes food items generally sold in a grocery store including meat and produce (Tr. 1117–18. Also see "grocer" and "grocery" in *Webster's Third International Dictionary of the English Language, Unabridged* (1961)).

29. The evidence shows that meat items comprise about 21% of Kroger's retail food store sales, produce items 7%, delicatessen items about 2%, grocery items 69%. Private label items comprise 28% of Kroger's grocery item sales (CXs 4–3, 8–2).

30. In the Southland marketing area, meat items comprised about 21½% of Kroger's retail food store sales during 1976, fresh produce items about 7%, delicatessen items about 2%, grocery items about 69%, and private label items about 28.3% (CXs 4–2, 5–2).

31. The reports published by *Supermarketing Magazine* in September 1977 on food expenditures generally parallel Kroger's sales, in that about 22% of all items in an average shopping basket for a family of four are meat items (28% of food items), and 11% produce items (14% of food items) (CX 810; Tr. 1013–28). These percentages are generally confirmed by the results of a Bureau of Labor Statistics Study published May 15, 1975 (CX 801). Seventeen percent to eighteen percent of Kroger's dollar volume of grocery items are direct-store-delivered (DSD) and are not distributed through Kroger's warehouses (JX 1: Pellin, p. 64). Meat and produce account for a significant portion of Kroger's dollar volume business (JX 1: Hoover, p. 56). Meat and produce also comprise a significant portion of consumer expenditures for food (Tr. 2985).

32. A typical Kroger store will stock approximately 10,000 to 15,000 items (JX 1: Hoover, p. 18; JX 1: Pellin, p. 23).

B. *Pricing of Kroger's Food Products*

33. The grocery merchandiser for each KMA has the responsibility for setting retail prices on all Kroger grocery items in the KMA (CXs 4–4, 5–4, 24–1, 25–1; Tr. 761; JX 2: Hoover, pp. 134, 177; JX 2: Stec, p. 103; JX 1: Pellin, pp. 21, 41–43; Tr. 748, 1658). Food prices change frequently (CX 22–1), and each week approximately 500 to 700 grocery items may change in price in a Kroger store (Tr. 1659–60). **[13]**

34. During the period the Price Patrol Program was operated in the various KMAs, Kroger also conducted a "roller" program (CXs 15, 16, 30–3, 41–1, 42–1). A "roller" is an item sold at a price reduced from regular retail price, yet producing better-than-average mark-up for the item or subgroup it represents (Tr. 2093–K; CX 15–4). Kroger instructed the KMA Grocery Merchandisers to price "rolled" items below competitors' prices, saying "It does no good to 'roll' an item down 4¢ and still be 2¢ higher than a major competitor" (CX 15–9). The "roller" price reflects a manufacturer's allowance or discount to Kroger (Tr. 1590, 2093–K), which was generally "passed through," in whole or in part, to the consumer (CX 41–1). The reduced retail or

"roller" generally lasts from 3 to 12 weeks (JX 1: Pellin, p. 40; Tr. 1591, 2093–K, 2093–L). At any given time, about 150 to 350 items will be "rolled" in a Kroger store (Tr. 735, 1595; JX 1: Pellin, p. 65). Fresh meat and produce generally have not been included in manufacturers' allowance programs (Tr. 674–75), and meat, produce, and delicatessen items were not included in Kroger's roller program (JX 1: Crague, p. 25). Items which were selected for inclusion in the roller program were considered higher-volume items and items recognizable to the consumer (Tr. 1675; JX 1: Crague, p. 27). The use of "rollers" by Kroger replaced in large part the offering of specials or deepcut features (CX 15–4; Tr. 2093–L, 2093–N to 2093–O). The grocery merchandiser for each KMA had the responsibility for deciding which items should be rolled, and for what period of time (JX 1: Pellin, pp. 40, 43). Roller items were advertised more frequently than items which were not rollers (CXs 40–1, 36–7, 15–7; Tr. 2148). Roller items were designed to attract consumers into the store (Tr. 2148).

35. Since the criteria for selecting rollers and Price Patrol items are generally the same (Tr. 1675–76), there would be a higher percentage of roller items on the Price Patrol list than the percentage of roller items throughout the store (Tr. 2735).

36. Kroger, through Mr. Hicks, attempted to show that placing rollers on the Price Patrol Survey had no effect on the Price Patrol Survey results (RX 980; Tr. 2360). However, RX 980, reflecting information for the last four weeks of 1977 for Dallas, Texas (Tr. 2414–15, 2418), cannot be generalized for all periods in all areas. Furthermore, using the same assumptions Mr. Hicks used in preparing RX 980, the inclusion of rollers in the Price Patrol Program in other areas supports an inference that inclusion of roller items in the Price Patrol Survey significantly affected the outcome of the Survey (Tr. 2415–18). [14]

37. Prices of fresh meat change rapidly at Kroger stores, but quality of meat does not change nearly as quickly as does price (Tr. 1947).

C. *Adoption of an Everyday Low Price Policy and Its Operation*

38. In 1971 and the early part of 1972, Kroger stores were "relatively high priced on . . . regular shelf prices throughout the entire store" and relied on heavy feature advertising on the weekends to attract customers (Thomas, Tr. 2093–E; Hicks, Tr. 2315). During this time period, consumers considered Kroger to be a high-priced store (Thomas, Tr. 2093–D).

39. In May of 1972 the decision was made that, in order to foster long-term growth, Kroger would become an "everyday low price" ("EDLP") merchant (Thomas, Tr. 2093–E, 2099; Hoover, Tr. 1566). Under the EDLP policy as initially envisioned, Kroger stores were to be as low as or lower in price than their competitors in each geographic market (Thomas, Tr. 2099; Hoover, Tr. 1564; Helmsing, Tr. 771–73, 800–02; CX 36–2; CX 47–2). Kroger stores in each market would "target" their prices on the lowest priced competitor in the market offering comparable merchandising services (Hoover, Tr. 1638; Helmsing, Tr. 800–01; CX 15–2).

40. The EDLP policy was meant to apply "across the board on all items that were carried in the [Kroger] store" (Thomas, Tr. 2093–E), including fresh meat and produce items (Thomas, Tr. 2104; Bere, Tr. 2002–05; Vaughn, Tr. 1929–34; CX 47–1). Respondent's witnesses stated that as the EDLP policy was implemented in many areas, Kroger stores, on a "total mix" of goods throughout the store, sought to be and were lower in price than their competitors (Thomas, Tr. 2099; Hoover, Tr. 1690; JX 2: Hoover, p. 156; JX 1: McDaniels, p. 25; CX 47–2). However, Kroger's internal price checks showed that Kroger more often than not had higher prices for meat and produce items (F. 145–167, *infra*).

41. In late 1972 Kroger's top management instituted a program to monitor compliance with the EDLP policy (Hicks, Tr. 2319). Mr. Dean Hicks was selected to administer this program at Kroger's headquarters and is responsible directly to the top management of Kroger for analyzing the monitoring surveys he administers and for ensuring full compliance with Kroger's EDLP policy (Hicks, Tr. 2310–13, 2319, 2335, 2348). **[15]**

42. After consulting with Kroger employees in the field and at headquarters as to the best means for monitoring Kroger's competitive position (Hicks, Tr. 2320–21), Mr. Hicks established a procedure whereby KMAs submit "full book checks" to him for selected markets on a quarterly basis for review and analysis (Hicks, Tr. 2342). Mr. Hicks also developed the "Burgoyne check," or "shopping basket survey," and selected Burgoyne, Inc., an independent marketing research company, to conduct these surveys under his general supervision (Hicks, Tr. 2320–21).

43. Kroger's EDLP policy was in effect in the four Kroger Marketing Areas relevant to this proceeding throughout the time the Price Patrol ran (Oliver, Tr. 2678–79, 2686–87; Benham, Tr. 2874–76). Of the 284 Kroger stores which participated in the Price Patrol Program in the four KMAs, 74% (210 stores) were subject to Burgoyne price checks and 70% (199 stores) were subject to

quarterly full book checks (RX 978; Tr. 2349–52). The evidence shows, however, that while the Price Patrol was being conducted in over 100 cities (CPF 48), full book checks were conducted in only 18 of these cities, and Burgoyne checks in only 22 cities (including the same 18 where full book checks were made) (RXs 947–964; RPF 117). Thus, in about 78% of the cities in which a Price Patrol survey was conducted, neither a full book check nor a Burgoyne check was made (CPRF 6).

44. With respect to those markets where Price Patrol surveys were conducted but Burgoyne surveys and full book checks were not, respondent's expert in survey design and methodology speculated that, had such price checks been conducted in those markets, the results would probably have been consistent with Price Patrol survey results, because of Kroger's adherence to its EDLP policy and because Price Patrol results were consistent with results of Burgoyne surveys and full book checks in other markets. However, the same witness admitted that he could not be sure whether the prices might be in fact lower, the same or higher (Tr. 2681–82).

45. During the Price Patrol period 306 Burgoyne surveys were conducted in 22 cities in the four KMAs involved in this case (RXs 925–946). Kroger had a lower dollar cost *total* on 1,419 of the 1,550 individual Burgoyne checks—91.5%. For the 306 dates the Burgoyne checks were conducted, Kroger had a lower dollar *total* than all competitors, or a lower dollar *total* than all but one competitor, 284 times—92.8% (RXs 925–946; RPF 115–116). **[16]**

46. Viewed in light of the results of each check (instead of dollar totals), in 1973, for the cities in the four KMAs involved in this case and running the Price Patrol at that time, Kroger conducted a total of 14 Burgoyne surveys. Of the 14 surveys, Kroger lost, or, in other words, did not have the lowest prices of those chains checked, 7 times or 50% of the total surveys. In 1974, there were 32 Burgoyne surveys. Kroger lost 11 of the 32, or 34% of the total surveys. In 1975, there were a total of 86 surveys. Kroger lost 29 of the 86, or 33% of the total surveys. In 1976, there were 86 Burgoyne surveys conducted. Of the 86 surveys Kroger lost 29, or 33% of the total surveys. For 1977, of a total of 57 Burgoyne surveys conducted that year, Kroger lost 19, or 33% of the total surveys. In 1978, there were a total of 11 Burgoyne surveys conducted, and of that total Kroger lost 2, or 18% of the total surveys. Thus, Kroger lost 33% of the Burgoyne surveys conducted from 1973 to 1978 (RXs 925–946; CPRF 7).

47. During the Price Patrol period, quarterly full book checks were conducted in 18 cities where Price Patrol was also conducted in

the four KMAs (RXs 947–964). A total of 189 quarterly full book checks were conducted in these 18 cities. Kroger had more *items* with lower prices than did the competitor on 608 of the 656 individual full book grocery checks—92.7% (RXs 947–964; RPF 117).

48. When viewed individually with respect to each full book check, in 1973, there were 8 full book checks conducted, and of that total Kroger lost 5, or 62.5% of the total checks. In 1974, there were 18 full book checks conducted, and of that total Kroger lost 5, or 33%. In 1975, there were 45 full book checks conducted, and of that total Kroger lost 6, or 13%. In 1976, there were 62 full book checks conducted, and of that total Kroger lost 11, or 17%. In 1977, there were 43 full book checks conducted, and of that total Kroger lost 8, or 18%. In 1978, there were 10 full book checks conducted, and of that total Kroger lost 1, or 10%. Thus, from 1973 to 1978, Kroger averaged a percentage loss of 25% of all full book checks conducted (RXs 947–964; CPRF 8–9).

49. For the 189 dates the quarterly full book check was conducted during the Price Patrol period, Kroger had more lower prices of items in the *grocery* department than competitors, except one, 183 times—96.8% (RXs 947–964; RPF 118). However, the evidence also shows that during the Price Patrol period, 1973–1978, Kroger lost on an average of 25% of the time in which full book checks were made (CPRF 9). **[17]**

50. The full book price check results for meat and produce items are submitted separately from the grocery department checks (Hicks, Tr. 2345; Oliver, Tr. 2672). Counts of items priced higher, lower, or the same for meat and/or produce items sometimes are not recorded on the recap sheet. During the Price Patrol period, 179 full book checks whose recap sheets included meat and/or produce were conducted in the relevant area. Totals of numbers of items, including meat and/or produce items, on which Kroger's prices were lower than, higher than or the same as a competitor were recorded for 523 separate checks against competitors. Kroger had more items with lower prices than did the competitor on 487 of these 523 full book checks—about 93.1% (RXs 947–964; RPF 119). However, the evidence also shows that of the 179 full book checks conducted between 1973 and 1978, which included meat and/or produce, Kroger lost on the surveys on an average of 32.8% (CPRF 10).

51. The results of most Price Patrol surveys generally showed that Kroger had more lower prices on surveyed items than any surveyed competitor (RXs 990–991, Nos. (4)–(5), (11); Hoover, Tr. 1601–02; JX 1: Pellin, p. 82; JX 1: Stec, pp. 102–03).

52. Two surveys of food prices in Atlanta conducted by the FTC

staff in June 1973 showed Kroger to be low overall (RX 225 *in camera,* pp. 11–12). The Burgoyne surveys conducted in Atlanta during the Price Patrol program showed Kroger with lower dollar totals than Big Apple, Big Star, Colonial, Winn-Dixie, Food Giant and K-Mart (RX 925). The full book checks showed Kroger with more lower prices, both for the grocery department and for all items, than Big Apple, Colonial, Winn-Dixie, Food Giant, and Richway (RX 947; RPF 129). However, the evidence also shows that during the same time period in Atlanta, Kroger lost to A&P 33% of the time Burgoyne surveys were conducted and lost to Treasure Island 50% of the time (CPRF 12).

53. A survey of food prices in Indianapolis conducted by a "public interest" group in December 1975 showed Kroger to be low overall (Sample, Tr. 484–86).

54. The evidence shows that of the five full book checks conducted in Indianapolis during the Price Patrol period, Kroger had more lower item prices than Standard, Eisner, Thrift-T-Mart, and A&P (RX 958). Of the 10 Burgoyne surveys conducted in Indianapolis during the Price Patrol program, Kroger had lower *dollar* totals than Marsh, Eisner, Standard, and Thrift-T-Mart (RX 939; RPF 132). **[18]**However, of the same 5 full book checks, Kroger lost to Marsh 3 out of 5 times surveyed (RX 958). Of the 10 Burgoyne surveys conducted in Indianapolis during the Price Patrol program, Kroger lost 9 times, or 90% of the time for all surveys conducted (RX 939; CPRF 13).

55. The three principal elements of competition in the food retail business are price, product quality and service, and price may not necessarily be the determining factor. Respondent recognized the fact that consumers formed pragmatic judgments about quality or value on the basis of their shopping experience over time, taking into account not only price but product quality (Tr. 1926, 2002, 2211–13).

56. The EDLP policy was designed to insure that Kroger stores are not only competitive in terms of price on a "total mix" of goods throughout the store but also offered "good value" and sought to project Kroger's image as a "value leader." (Tr. 1690; 2099; CX 47–2, RX 901–2).

57. In contrast, the Price Patrol program focused on the *prices* of *selected* items for advertising purposes. The Price Patrol excluded fresh meat and produce categories and did not relate to the total mix of items throughout the store. The Price Patrol advertisements in evidence do not mention "value" but stress low *prices* and seek to project Kroger as a "low price leader."

III. Kroger's Price Patrol Program And Claims Contained In Certain Price Patrol Advertisements Challenged In The Complaint

A. *The Purpose of the Price Patrol Program*

58. In late 1972, Kroger instituted an "everyday low price policy" ("EDLP") (Tr. 2093–E, 2099). Mr. Dean Hicks, who was directly involved in developing and writing the "Everyday Low Price" policy for Kroger (Tr. 2312), testified that Kroger's everyday low price policy "will be such that over time the consumer can buy her supermarketing needs at as good as or better total value at Kroger as she can at any other comparable retailer" (Tr. 2313–14). He defined "total value" to include price and quality, considered over time (Tr. 2314–15).

59. Other Kroger officials confirmed that being "competitive" did not mean being the cheapest place to shop (Tr. 771–72, 1564). For example, Mr. Ted R. Hoover, who was [19]grocery merchandiser for Kroger's Southland Marketing Area from 1970 until 1977 when he resigned, agreed that "the policy . . . was not necessarily to be lower than everybody" (Tr. 1638–39). "That doesn't necessarily mean that you would be lower than every competitor in the market" (Tr. 1638). The Kroger manual explaining the Price Patrol (CX 15) also confirms that Kroger's policy was not to be the cheapest place to shop: "Kroger prices must be *as low as* the lowest merchant in town (offering the same services). . . . The key is 'offering the same services.'" (CX 15–2, emphasis added).

60. The Price Patrol surveys were not used nor relied upon by Kroger officials to determine Kroger's competitive price position (Tr. 1649, 2439). Mr. Hoover testified that "Price Patrol . . . was not used . . . to determine somebody's pricing posture." (Tr. 1649). Mr. Dean Hicks, whose responsibility included monitoring Kroger's "every day low price program" (Tr. 2306–07) testified:

> Q. I understand that, but my question is more simple. Did you use the Price Patrol results to help you to monitor your "Everyday Low Price" posture?
>
> A. No.
>
> Q. In other words, you had checks done weekly in many KMAs, price checks done weekly in many KMAs, and you didn't use them to determine your competitive position; isn't that right?
>
> A. That is correct. (Tr. 2439)

The record evidence clearly shows that Kroger officials, including those with responsibility for insuring Kroger's competitive posture, did not use the Price Patrol to monitor Kroger's prices.

61. There is evidence showing that Kroger, concerned about its

reputation as a high-priced store, conceived the Price Patrol campaign in part as a merchandising and advertising program which will change that reputation and effectively communicate Kroger's "every day low price policy" to the consumer (Tr. 761; CX 15, CX 30–2; JX 1: Crague, pp. 11–12; CX 75–17). However, the record also clearly shows that the Price Patrol was meant to do more. As the Price Patrol emerged, emphasis was increasingly placed on demonstrating or "proving" to the housewives that [20]Kroger had the lowest prices in town (Tr. 1695; F. 109–111, *infra*). Furthermore, Kroger clearly recognized the role of the Price Patrol as a means of preventing further erosion of its sales in certain areas and to increase its market shares and profitability in other areas (Tr. 760; CXs 15, 70–1, 75–17).

B. *Price Patrol Survey Procedures*

62. The Price Patrol program started in Atlanta, Georgia in 1972 (RX 900–3). The other Marketing Areas followed the pattern set by the Atlanta experience in running the program (Tr. 751, 756–57, 794, 1563, 1601). Although each KMA had responsibility for implementing and operating the Price Patrol program in its area, the Price Patrol procedures in any given KMA followed the manuals distributed by the General Office and further incorporated past experiences in other KMAs (Tr. 1773; JX 1: Crague, p. 7; *cf.*, CX 75 with CXs 15 and 16). For example, the program in Dallas was based on what had been developed in Atlanta, and the Price Patrol program in Indianapolis (Central Marketing Area) was based on what had been done in Atlanta and Dallas (Tr. 756–57; CX 36–1).

63. The control which Kroger's General Office exercised over the Price Patrol program in the KMAs was demonstrated by several events. The manuals describing the program (CXs 15 and 16) were distributed by the General Office. Each KMA utilizing the Price Patrol program followed the basic guidelines set forth in CXs 15 and 16, and conducted the program in substantially the same manner (CXs 15, 16, 36, 73, 75; Tr. 756–57, 794–95; JX 1: McDaniels, pp. 6–7; Tr. 1871). The General Office, including Mr. Lyle Everingham, Executive Vice President of Kroger (JX 1: Pellin, pp. 12–13), and Mr. Gene Hoffman, President of the Kroger Company (JX 1: Pellin, p. 13), was given a presentation regarding the Dallas Price Patrol program before the program was instituted in Dallas (CX 39–1). The General Office required that specific changes be made in Price Patrol advertising copy (CX 22), and, after August 1977, each KMA using the Price Patrol was required to submit copies of all advertising to Kroger's General Office (CX 23). Campbell-Mithun, Kroger's

advertising agency (JX 1: Pellin, p. 11), was largely responsible for the television commercials, and assisted with weekly television advertising copy and production in Dallas (Tr. 757). Campbell-Mithun also had input into the decision to commence the Price Patrol program in Dallas (Tr. 757). Campbell-Mithun informed the Kroger officials in Dallas about the results of the Atlanta program and provided examples of television advertisements used in Atlanta (Tr. 758). Finally, the [21]decision to terminate the program was a corporate decision (F. 107).

64. Items to be included on the Price Patrol check lists were selected by the grocery merchandiser in each KMA (Hoover, Tr. 1573; JX 1: Crague, p. 41; JX 1: Pellin, p. 52). The grocery merchandisers utilized three criteria to select Price Patrol items:

(1) items had to be "high-volume," high-recognition items, meaning items which were readily recognizable to the consumer and likely to be purchased frequently by consumers (Thomas, Tr. 2100; Hoover, Tr. 1574, 1581; JX 2: Hoover, p. 114; JX 1: Pellin, pp. 54–56; JX 1: Crague, pp. 39, 42);

(2) items had to be taken from "commodity" areas throughout the store (Hoover, Tr. 1576; Thomas, Tr. 2100–01; Oliver, Tr. 2609–13, 2634; RXs 920–924; JX 2, Hoover, pp. 114–16; JX 1: Pellin, pp. 54–55; JX 1: Crague, pp. 39, 42; Stec, Tr. 1699). "Commodity" in this context means "grocery" category (F. 28);

(3) items had to be commonly available on the shelves to be checked at competing stores (JX 2: Stec, p. 86; JX 1: Pellin, pp. 53–54; JX 2: Hoover, p. 128; Hoover, Tr. 1575; Thomas, Tr. 2101; CX 15–12; CX 16–5).

65. Items in fresh meat and produce categories were not included in the Price Patrol because of Kroger's belief that the quality on these items varied among different stores so as to make these items not comparable (Thomas, Tr. 2101; Hoover, Tr. 1574–76; JX 1: Hoover, pp. 55–56; JX 1: Pellin, pp. 68–69; JX 2: Stec, pp. 85–86, 88–90).

66. Similarly, private label items generally were not included in the Price Patrol because of Kroger's belief that the quality of private label products varied among different stores (Hoover, Tr. 1575; JX 1: Hoover, p. 55; JX 2: Hoover, p. 128; JX 1: Pellin, pp. 53–54). However, such private label items as milk and eggs were included on Price Patrol because the quality of these items was thought to be essentially the same from store to store (Hoover, Tr. 1575–76; JX 1: Pellin, p. 54; JX 2: Stec, pp. 86–87; Morgan, Tr. 714).

67. The selection criteria requiring that items be high volume

items and representative of the "commodity" areas of the store were designed to obtain a mix of commodity items [22]one would normally find in a customer's shopping basket (JX 1: Pellin, p. 56). In order to identify items which fit these two criteria, Kroger personnel used a quarterly Kroger computer printout report, which detailed the unit movement of commodity items through each Kroger warehouse (Hoover, Tr. 1574; Thomas, Tr. 2100; JX 1: Hoover, pp. 8–10; JX 1: Crague, pp. 42–43; JX 1: Pellin, pp. 61–62, 67). These computer reports divide goods into commodity categories, listing the unit movement of all items which fall into each commodity grouping (Hoover, Tr. 1574).

68. Kroger personnel reviewed the computer printouts and selected the highest volume items, excluding private label items, from the various commodity categories (Hoover, Tr. 1574, 1665–66; JX 1: Hoover, p. 10). Items which were not the "top mover," or highest volume item in a commodity category, but which were, in the grocery merchandiser's judgment, highly recognizable to consumers, were also included in the Price Patrol (JX 2: Hoover, pp. 123, 126; JX 1: Hoover, pp. 12–13, 20–21, 55; JX 1: Pellin, pp. 55–56; Hoover, Tr. 1666–67; Helmsing, Tr. 773).

69. Kroger personnel utilized separate documents on movement of commodity items shipped directly by the vendor to the store (direct store delivery, or "DSD," items) which were not included on the computer printout (JX 1: Pellin, p. 67). Between 15 and 20 of the items on each Price Patrol check list were DSD items (JX 1: Hoover, pp. 9–10, 19–20).

70. Use of the computer printouts and other documents, as well as the experience of the personnel selecting the Price Patrol items, helped ensure that the Price Patrol lists were tailored to the commodity purchasing patterns of each marketing area (JX 1: Hoover, p. 4; Hoover, Tr. 1576–77; JX 1: Crague, p. 43). The Vice President of each KMA reviewed the list of items selected by the grocery merchandiser to ensure that the criteria for selection had been followed (Thomas, Tr. 2101).

71. Each grocery merchandiser compiled a list of about 600 commodity items (Thomas, Tr. 2100–01; Hoover, Tr. 1579; JX 1: Pellin, p. 57). The Advertising Manager of the KMA then divided the 600 items into four smaller lists of 150 items each, one of which was used for Price Patrol each week. Items from the various commodity groups were apportioned evenly among the four smaller lists (Stec, Tr. 1699; JX 2: Stec, pp. 84–85).

72. The Price Patrol lists were reviewed by the grocery merchandiser and his assistants approximately once [23]a quarter (JX 1:

Hoover, pp. 23–24). Changes were made in Price Patrol lists approximately twice a year, most frequently because an item was dropped by Kroger or by a number of its competitors, so that comparison was impossible (Thomas, Tr. 2127; Hoover, Tr. 1578–79; Stec, Tr. 1699–1700; JX 1: Cragué, pp. 43–44; JX 1: Hoover, p. 22; JX 1: Stec, pp. 73–74, 119). Other reasons for changing items were the introduction of new items into the market, changes in popularity of items, and seasonality of some items (Thomas, Tr. 2127–28; JX 1: Hoover, p. 22; JX 1: Cragué, pp. 43–44).

73. Respondent's employees Mr. Hoover and Mr. Hicks testified that the representativeness of the Price Patrol lists is significantly increased by the fact that there are direct pricing relationships, known as "parity" relationships, among many similar retail food store items (Hoover, Tr. 1584–85, 1641; Hicks, Tr. 2353–58). To the extent that this principle is put into practice by Kroger, a change in the price of a Price Patrol item may be accompanied by similar price changes in a number of related items which are not on the Price Patrol lists (JX 2: Hoover, p. 159). However, the parity pricing relationship discussed by Mr. Hoover and Mr. Hicks does not say anything about the prices of items at any competitor stores (Tr. 1640, 1642, 1648–49) and does not even apply consistently at Kroger, as shown by several examples taken directly from Kroger's own representative Price Patrol lists. Mr. Hoover, testified that knowing the price of one size of an item at Kroger and at a competitor's store would give you "some idea" about Kroger's price relationship to its competitor on another size of the same item, but ". . . it would depend on whether or not all competitors use parity pricing, which in fact they did not" (Tr. 1640). Thus, the "parity" concept did not allow Kroger to assume that, if one size product appears on the Price Patrol list, a competitive posture to a larger or smaller size product not on the Price Patrol list could be determined (Tr. 1646–47). For example, Mr. Hoover testified that RXs 905, 906, and 907 were typical Price Patrol lists (Tr. 1639). He further testified that on these typical Price Patrol lists (RXs 905, 906, 907), Kroger's price competitive position on certain like items of different sizes was different (Tr. 1644–52), *i.e.,* Kroger was lower priced on a quart of Purex bleach and higher priced on a gallon of Purex bleach (Tr. 1644).

74. One example of "parity pricing" involves different flavors of the same name-brand product—*e.g.,* different flavors of Betty Crocker cake mix, or different flavors of [24]Hi-C fruit drink—which are generally priced the same. Thus the price of one Betty Crocker cake mix or one flavor of Hi-C fruit drink represents the price of all

Betty Crocker cake mixes or all Hi-C fruit drinks of the same size (Hoover, Tr. 1583; Hicks, Tr. 2355; Oliver, Tr. 2638–39; JX 2: Hoover, pp. 116, 159).

75. Another "parity pricing" relationship is created by the pricing of a larger size of an item to be, on a per-ounce basis, lower in price than the next smaller size of that item. Thus, a 20-ounce bottle of a particular brand of ketchup is likely to be priced, on a per-ounce basis, less than the 14-ounce size of the same brand (Hoover, Tr. 1582; JX 2: Hoover, p. 159; Hicks, Tr. 2355).

76. The items on the Price Patrol lists account for approximately 19% of total grocery department sales and 11% of total retail store sales (RX 979; Hicks, Tr. 2352–54; Oliver, Tr. 2637). The total sales of Price Patrol items and items actually priced in "parity" with them are estimated by Kroger to account for approximately 42% of total grocery department sales and 25% of total retail store sales (RX 979; Hicks, Tr. 2352–54; Oliver, Tr. 2637).

77. The stores selected for inclusion on the Price Patrol were Kroger's major competitors, *i.e.*, those which were familiar to consumers in that geographic market and which operated comparable outlets with similar merchandising services (JX 1: Pellin, p. 69; CX 15–2, CX 15–11; CX 16–5).

78. The Price Patrol price checkers were not full-time Kroger employees, but worked part-time and only on Price Patrol. Civic groups, television stations, store managers, and others suggested candidates who were then given screen tests at a television station. Those applicants who had good camera appearance were selected as price checkers (Stec, Tr. 1703; JX 1: McDaniels, p. 6; JX 2: Stec, pp. 77–78).

79. The Price Patrol price checkers were given thorough instructions on how to conduct the Price Patrol checks (JX 1: Pellin, pp. 96–97; Stec, Tr. 1704; Helmsing, Tr. 763). As part of their training, they were "walked through" a Kroger store by the grocery merchandiser, sometimes accompanied by the advertising manager, at which time the Price Patrol check list was reviewed item by item (Stec, Tr. 1704; Helmsing, Tr. 763; JX 1: Pellin, pp. 96–97; JX 1: McDaniels, p. 10; CX 16–4, CX 16–6). **[25]**

80. The Price Patrol price checkers were free to check their assigned stores any day of the week they chose (JX 2: Stec, p. 79), although it was recommended that checks be made on certain days of the week when stores were more fully stocked (JX 1: McDaniels, pp. 15, 34–35; Helmsing, Tr. 765–66). They were not told which Kroger store or competitors' stores to check, and were free to check different stores each week (JX 2: Stec, p. 79; JX 1: Pellin, p. 69; JX 1:

McDaniels, p. 13). Prices in Kroger stores were checked in the same manner as in competitors stores, by recording retail prices as they appeared on items on the shelf (JX 1: Pellin, p. 70; JX 1: Crague, p. 56). However, Kroger's own prices were occasionally obtained from company price books rather than from the actual shelf prices (CXs 25–2, 37–1, 37–2, 53).

81. The KMA Advertising Department designated which of the three or four lists was to be checked each week, rotating the lists from week to week (Stec, Tr. 1701–02; RX 903; JX 2: Stec, pp. 81–83; JX 1: McDaniels, pp. 12–13; JX 1: Crague, pp. 54–55). The order of rotation was determined at the beginning of each quarter for the coming 12 or 14 week period (Stec, Tr. 1700; RX 903; JX 1: Stec, p. 120; CX 16–6, 16–17). The Advertising Department sent the lists by mail directly to the price checkers (Stec, Tr. 1700; JX 1: McDaniels, pp. 12–13; JX 2: Stec, p. 82; JX 1: Crague, p. 54).

82. Neither the grocery merchandising department, the store managers, nor anyone else other than the KMA Advertising Department and Price Patrol price checkers knew prior to each week's Price Patrol check which Price Patrol lists would be checked that week (Hoover, Tr. 1581; JX 2: Hoover, pp. 119–20; Stec, Tr. 1702; JX 1: Stec, pp. 120–21; JX 2: Stec, pp. 81–83; JX 1: Crague, p. 54; JX 1: Hoover, pp. 64–65, 68–69).

83. After completion of each week's price check, the check lists were returned to the Advertising Department (Stec, Tr. 1705). Trained Kroger advertising personnel then "recapped" the check lists, that is, calculated and recorded the number of items on which Kroger was priced lower than, priced the same as, and priced higher than, each competitor (RX 902; JX 1: Stec, pp. 90–91).

84. Emphasis was placed on ensuring that the Price Patrol checks were accurate (Stec, Tr. 1707–08, 1824; RX 902; JX 1: McDaniels, p. 11; CX 15–12; CX 16–5, 16–7; CX 95–2). **[26]**The KMA assistant advertising managers, as well as the individuals recapping the price check lists, reviewed the lists for obvious errors (Stec, Tr. 1705–08; JX 1: Stec, pp. 84–86, 89–91; JX 2: Stec, pp. 105–06).

85. When it was suspected that an error had been made, the pricing analysts in the grocery merchandising department were consulted. If it was confirmed that an error had been made, the price checker responsible was immediately so notified (RX 902; Stec, Tr. 1705; JX 2: Stec, p. 106; JX 1: Pellin, p. 95; JX 1: McDaniels, p. 11; CX 62). If a price checker made repeated errors, a grocery merchandising representative would take her to a Kroger store to instruct her again on the proper price checking procedures (RX 902).

86. Items on which errors had been made to Kroger's advantage

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were removed from that week's Price Patrol recap, but errors in favor of a competitor were left in the report (JX 1: Pellin, p. 91).

87. The KMA assistant advertising managers also checked the recap sheets for accuracy in the computation of the number of items on which Kroger was priced lower than, higher than, and the same as each competitor (Stec, Tr. 1707). After the recapping process was completed, the results (in the form of a box score) were inserted in the television scripts and newspaper advertisements which were to publicize that week's Price Patrol checks (JX 2: Stec, pp. 80, 90–91; JX 1: Pellin, p. 91).

88. The recap sheets, along with exact duplicates of the check lists detailing the item-by-item price comparisons, were posted in each Kroger store (Thomas, Tr. 2106–07; Stec, Tr. 1709, 1752–55; JX 1: Pellin, p. 91; JX 2: Stec, p. 80; CX 16–10, 16–18; CX 74–10). RXs 905, 906 and 907 are representative of the recap sheets and Price Patrol check lists which were posted in Kroger stores (Stec, Tr. 1752–55).

89. Customers were invited in Price Patrol advertising to examine the complete checklists (see RFP 201). A significant number of Kroger customers did so (Stec, Tr. 1710, 1814; CX 708–3). Representatives of Kroger's competitors also reviewed the recap sheets and price check lists posted in Kroger stores (Stec, Tr. 1710–11, 1753).

90. When Kroger "lost" a weekly Price Patrol check, that is, when a competitor was lower priced than Kroger on a greater number of items, Kroger truthfully so stated in its advertising (see RPF 204). When that occurred, the [27]grocery merchandising department conducted a special full book or other price check of that competitor to ascertain what price adjustments, if any, Kroger needed to make in order to assure its prices were as low as its competition (Hoover, Tr. 1602–03, 1605, 1607–11; JX 1: Hoover, pp. 50, 52; JX 2: Hoover, pp. 178–80).

91. The 150-item list checked each week by the Price Patrol checkers was taken from a master list of approximately 400–600 items (Tr. 764; CXs 15–10, 81). The 400–600 items are selected by the Grocery Merchandiser in each marketing region, and the master list was divided into four 150-item lists (CXs 4–5, 5–3, 21–8; Tr. 747–48, 761, 764, 765; JX 1: Hoover, pp. 3–4; JX 1: Crague, pp. 41–43). When the list is changed, the Grocery Merchandiser is responsible for deleting or adding items (Tr. 765; JX 1: Crague, p. 44; JX 1: Hoover, p. 23). The master list is not made available to the public or to competitors.

92. Generally, the advertising department in each KMA rotated the list to be used each week (CX 5–3; JX 1: Stec, p. 114; Tr. 1699).

Initially, in Indianapolis the Grocery Merchandiser was responsible for selecting the master list and for breaking the list down into four weekly samples, and for selecting which list to use each week (JX 1: Pellin, pp. 52, 58, 102). In the Delta KMA, the advertising department, together with the grocery merchandising department, selected the rotation of the lists (CX 75–13).

93. In sum, the Price Patrol lists selected by the Grocery Merchandiser had the following general characteristics:

a. No fresh meat items were included (Tr. 1335, 1574, 1661, 1815, 2101, 2144–45, 2445, 2708, 2855; CXs 806, 807, 808).

b. No produce items were included (Tr. 1335, 1574, 1661, 1815, 2031, 2101, 2144–45, 2445, 2708, 2855; CXs 806, 807, 808).

c. No delicatessen items were included (Tr. 1661, 2144–45, 2745–46; CXs 4–1, 8–1).

d. The items selected on the lists were high-movement items (in terms of dollar volume through Kroger's warehouse), and items recognizable to the consumer (Tr. 1664, 1667; JX 1: Hoover, p. 8; JX 1: Crague, pp. 39, 42; CX 5–4). [28]

e. The items selected were national brands, except for, occasionally, milk, ice cream, fresh bakery items, and other commodity private label items (CXs 15–10, 75–13; Tr. 773–74, 1575, 2144–45; JX 1: Hoover, p. 13).

f. The items selected were not chosen on the basis of random selection (Tr. 1665–66, 2715).

g. The items selected were not based on the distribution of actual consumer food purchasing patterns in the city or region (Tr. 2731).

h. The items were not selected in relation to Kroger's food store sales volume (Tr. 1667, 2731).

i. Very few of the items were direct-store-delivered items (Tr. 1661–62, 2144–45).

94. The grocery merchandisers were aware of which items were "rollers" and which items were included on the Price Patrol lists (Tr. 1687, 2145–46). The criteria for selecting rollers were generally the same as the criteria for including items on the Price Patrol Survey (Tr. 1675–76). In fact, the Price Patrol guideline manual (CX 15) strongly suggests that "proper roller items" be included in the Price Patrol lists:

> If the correct pricing posture is being maintained and if the proper "roller" items are being used, Kroger will be lower on more items and higher on fewer items than any competitor checked. If this is not the case, the television is wasted and cannot be used. (CX 15–13).

95. Mr. Pellin, the Grocery Merchandiser from the Central Marketing Area, testified that he regularly changed items on the Price Patrol lists to include 20 to 40 items which were to be rolled down in price for that week (JX 1: Pellin, pp. 58–60, 72). The only factor Mr. Pellin considered in deciding to change the list was whether or not the item was rolled (JX 1: Pellin, p. 61).

96. Taking the maximum number of rollers in a Kroger store at one time (350) and dividing by the lowest estimate of the total number of items in a typical Kroger store **[29]**(10,000) (F. 32), it can be concluded that only 3.5% of Kroger items are rolled at any one time. Yet, Mr. Pellin states that between 13% (20 divided by 150) and 26% (40 divided by 150) of the items on the Price Patrol were rollers (JX 1: Pellin, p. 60). Mr. Hoover stated that between 15% and 20% of the items on the Price Patrol in the Southland Marketing Area were rollers (Tr. 1597). Kroger's own document, RX 980, shows that in Dallas, the percentage of rollers on the Price Patrol ranged from 7% to 13% for the last four weeks of 1977.

97. Thus, rollers are represented on the Price Patrol in a percentage in excess of the percentage of roller items in the store. Mr. Oliver, Kroger's expert witness, agreed that one would expect the rollers to be over-represented on the Price Patrol (Tr. 2735). Mr. Oliver also conceded that this over-representation provides a bias in favor of Kroger (Tr. 2735–36).

98. Kroger excludes at least 50% of the items in the store from Price Patrol lists: meat (21%), produce (7%), delicatessen (2%), most grocery private label items, 28% of grocery items or 19% (28% $\times$ 69%), most low-volume items in the store, and most direct-store-delivered items (17%–18%) (CX 5–2; F. 93). Therefore, Kroger could have higher prices than its competitors on meat, produce, delicatessen, most private label items, most direct-store-delivered items, and most low-volume items in the store, and still win on the Price Patrol (Tr. 2144–45).

99. As initially conceived and actually executed, the Price Patrol program used television as its primary advertising medium (CX 30–4, CX 30–5; CX 15–11; CX 47–1; Stec, Tr. 1712). During the period of Price Patrol, 60% of the advertising budget of the Southland KMA was used for television advertising and 20% for newspaper advertisements (Stec, Tr. 1712).

100. The media usage pattern utilized in Southland was generally followed in other KMAs which adopted the Price Patrol program (Stec, Tr. 1871–72; Helmsing, Tr. 756–58, 794; JX 1: McDaniels, pp. 20–21; CX 47–1).

101. The advertisements contained in RX 537–1 through 14

(television commercials), RX 540–1 through 2 and RX 566–1 through 2 (newspaper advertisements) are typical of the Price Patrol advertisements.

102. The claims contained in the Price Patrol advertisements regarding the number of items on which Kroger was priced lower than, higher than, or the same as each competitor each week were based solely on the Price Patrol price checks (JX 1: Hoover, p. 39; Stec, Tr. 1822–23). **[30]**

103. Kroger employees testified that the claims contained in the Price Patrol advertisements that Kroger was the "low price leader" were based not only on the Price Patrol price checks, but also generally on Kroger's EDLP pricing policy and a number of other price checks including the full book checks and the Burgoyne checks, which in Kroger's view verified its competitive position as the lowest priced retailer in the market (Thomas, Tr. 2158; JX 1: McDaniels, pp. 22–23; Helmsing, Tr. 774–75, 77–78, 796–99; Stec, Tr. 1695–96; JX 1: Pellin, pp. 17–18; Thomas, Tr. 2099–2100; Hoover, Tr. 1612, 1690). However, they also admitted that Kroger did not use any specific full book check or Burgoyne check for the purpose of verifying the accuracy of Price Patrol advertising program (F. 205–206, 222–223, *infra*).

C. *The Scope of the Price Patrol Advertising Program*

104. Kroger's Price Patrol program began in Atlanta, Georgia, in December of 1972 (RX 900–3). Since that time, Kroger introduced the program in six other KMAs, including over 100 cities in 14 states: Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas (CX 1–3 through 1–5; RX 900).

105. The following tables show where and when the Price Patrol program was conducted in the Central, Dallas, Southland, and Delta KMAs (CXs 1, 3; RX 900):

Price Patrol Beginning Dates and Ending Dates

Central KMA	Begin	End
Indianapolis	9/8/75	9/11/76
Bloomington	10/20/75	9/11/76
Kokomo	10/27/75	9/11/76
Ft. Wayne	10/5/75	3/4/78
Dallas KMA	**Begin**	**End**
Dallas Area		
Dallas	3/18/75	3/11/78
Irving	3/18/75	3/11/78
Duncanville	3/18/75	3/11/78
Richardson	3/18/75	3/11/78
Farmers Branch	3/18/75	3/11/78
Grand Prairie	3/18/75	3/11/78 [31]
Plano	3/18/75	3/11/78
Garland	3/18/75	3/11/78
De Soto	3/18/75	3/11/78
Mesquite	3/18/75	3/11/78
Lewisville	4/22/75	3/11/78
Nacogdoches	3/18/75	3/11/78
Waxahachie	3/18/75	3/11/78
Marshall	3/18/75	3/11/78
Paris	3/18/75	3/11/78
Greenville	3/18/75	3/11/78
Shreveport, Louisiana	3/18/75	3/11/78
Bossier City, Louisiana	3/18/75	3/11/78
Sherman/Denison	3/18/75	3/11/78
Gainesville	3/18/75	4/10/76
Nachitoches, Louisiana	3/22/75	9/22/76
Ft. Worth	3/29/75	3/11/78
Arlington	3/29/75	3/11/78
Terrell	11/19/77	3/11/78
Denton	5/15/75	3/11/78
Tyler	5/8/76	3/11/78
Weatherford	6/18/77	3/11/78
Longview	3/22/75	3/11/78
Sulfur Springs	3/22/75	3/11/78
Hurst	8/24/76	3/11/78
Duncan, Oklahoma	6/26/77	2/25/78

Dallas KMA	Begin	End
Ada, Oklahoma	6/26/77	2/25/78
Lawton, Oklahoma	6/26/77	2/25/78

Southland KMA	Begin	End
Atlanta	12/7/72	3/15/78
Athens	10/8/73	3/15/78
Augusta	6/17/73	3/15/78
Albany	7/22/73	3/15/78
Carrollton	11/30/76	3/15/78
Chattanooga	4/1/73	5/6/78
Macon	12/2/73	3/15/78
Nashville	6/30/74	5/6/78
Knoxville	6/4/73	3/15/78
Huntsville	6/30/74	5/6/78
Decatur	6/30/74	5/6/78
Florence/Sheffield	7/28/74	5/6/78
Bowling Green	7/28/74	5/6/78
Gallatin	9/23/75	5/6/78
Douglasville	9/22/75	3/15/78 [32]

Delta KMA

Humboldt, Tennessee	Warren, Arkansas
Paragould, Arkansas	Parris, Tennessee
Poplar Bluff, Missouri	Brownsville, Tennessee
Wynne, Arkansas	Blytheville, Arkansas
Hamburg, Arkansas	Clarksdale, Mississippi
Tunica, Mississippi	Tupelo, Mississippi
Marks, Mississippi	Cleveland, Mississippi
Starkville, Mississippi	Camden, Arkansas
Aberdeen, Mississippi	Oxford, Mississippi
Prinkley, Arkansas	Greenwood, Mississippi
Kosciusko, Mississippi	Helena, Arkansas
West Point, Mississippi	Greenville, Mississippi
England, Arkansas	Vicksburg, Mississippi
DeWitt, Arkansas	Malvern, Arkansas
Lonoke, Arkansas	Hope, Arkansas
Paris, Arkansas	Stuttgart, Arkansas
Morrilton, Arkansas	Jonesboro, Arkansas
Magnolia, Arkansas	Newport, Arkansas
Jackson, Tennessee	Russellville, Arkansas

Union City, Tennessee	Batesville, Arkansas
Paducah, Kentucky	Conway, Arkansas
Mayfield, Kentucky	Pine Bluff, Arkansas
Murray, Kentucky	Hot Springs, Arkansas
Dyersburg, Tennessee	Ft. Smith, Arkansas
Little Rock, Arkansas	Memphis, Tennessee

106. For all cities in the Delta KMA where the Price Patrol was conducted, the Price Patrol began sometime during August 1975 and September 1975. The Price Patrol ended in all such cities by December 1, 1976, with the Price Patrol ending in most such cities by September 1, 1976 (RX 900).

107. Most of the cities conducting the Price Patrol program did not terminate the program until after the Complaint issued in Docket No. 9102. The Price Patrol program was terminated in all cities by May 1978. The decision to terminate the program was a corporate decision, and was based primarily on the fact that this litigation (Docket No. 9102) was pending (Tr. 2130, 2161).

D. *Certain Claims Made in the Price Patrol Advertisements*

108. The Kroger Price Patrol program was advertised in newspapers, circulars, and on television (JX 1: McDaniels, pp. 16–17; Tr. 1712–13). In the Southland Marketing Area, 60% of the advertising budget was spent on television [33]advertising for the Price Patrol (Tr. 1712), and 15% of the advertising budget on newspaper advertising, which included the Price Patrol (Tr. 1712). This relationship generally held true for other KMAs which conducted the Price Patrol (Tr. 1871). In the Southland Marketing Area, the production costs for advertising represent 13% of the advertising budget (plus or minus 2%) (Tr. 1878). As the Price Patrol program matured and sales increased, the media cost, as a percentage of sales, was projected to decrease (CXs 15–11, 13). Kroger advertised the results of the "Kroger Price Patrol" on a weekly basis, comparing some Kroger prices with prices of the leading competitors in a particular geographic area. The results of these comparisons were advertised in the form of tables (Ans. ¶ 4). These tables displayed results showing the number of items for which Kroger's prices were higher than, lower than, or the same as, each competitor's prices but did not display the actual prices (Tr. 2765; JX 1: Pellin, p. 76; CXs 125, 131; RXs 905, 906, 907). Certain advertising claims accompanied the charts which purported to generalize from the survey results (Ans. ¶5).

109. Kroger has represented in certain advertisements, directly or by implication, that the results of the Price Patrol Survey prove that most items in respondent's stores are priced lower than in competitors' stores (Complaint Counsel's Motion For Summary Decision, dated February 24, 1978; Memorandum Of Respondent, The Kroger Company, In Opposition To Complaint Counsel's Motion For Summary Decision, dated April 14, 1978; Reply To Memorandum Of Respondent, dated April 24, 1978; Reply Memorandum Of Respondent, dated May 6, 1978; Order Ruling On Complaint Counsel's Motion For Summary Decision, dated May 17, 1978 (pp. 4–6); Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 12, 1978; Complaint Counsel's Answer To Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 15, 1978; Order Ruling On The Kroger Company's Motion For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal, dated June 19, 1978).

110. Kroger has represented in certain advertisements, directly or by implication, that the results of the Price Patrol Survey prove that shopping at Kroger, rather than at competitors' stores, will result in lower overall [34]expenditures. (Complaint Counsel's Motion For Summary Decision, dated February 24, 1978; Memorandum Of Respondent, The Kroger Company, In Opposition To Complaint Counsel's Motion For Summary Decision, dated April 14, 1978; Reply To Memorandum Of Respondent, dated April 24, 1978; Reply Memorandum Of Respondent, dated May 6, 1978; Order Ruling On Complaint Counsel's Motion For Summary Decision, dated May 17, 1978 (pp. 4–6); Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 12, 1978; Complaint Counsel's Answer To Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 15, 1978; Order Ruling On The Kroger Company's Motion For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal, dated June 19, 1978.)

111. Kroger has represented in certain Price Patrol advertisements, directly or by implication, that shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures. (Complaint Counsel's Motion For Summary Decision, dated February 24, 1978; Memorandum Of Respondent, The Kroger Company, In

Opposition To Complaint Counsel's Motion For Summary Decision, dated April 14, 1978; Reply To Memorandum Of Respondent, dated April 24, 1978; Reply Memorandum Of Respondent, dated May 6, 1978; Order Ruling On Complaint Counsel's Motion For Summary Decision, dated May 17, 1978 (pp. 4–6); Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 12, 1978; Complaint Counsel's Answer To Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 15, 1978; Order Ruling On The Kroger Company's Motion For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal, dated June 19, 1978.)

112. Kroger has represented in certain advertisements, directly or by implication, that the Price Patrol Survey is a methodologically sound survey. (Complaint Counsel's Motion For Summary Decision, dated February 24, 1978; Memorandum Of Respondent. The Kroger Company, In Opposition To Complaint Counsel's Motion For Summary Decision, dated April 14, 1978; Reply To Memorandum Of Respondent, dated April 24, 1978; Reply Memorandum Of Respondent, dated May 6, 1978; Order **[35]**Ruling On Complaint Counsel's Motion For Summary Decision, dated May 17, 1978 (pp. 4–6); Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 12, 1978; Complaint Counsel's Answer To Motion Of Respondent, The Kroger Company, For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal From That Order, dated June 15, 1978; Order Ruling On The Kroger Company's Motion For Reconsideration Of The Order Of May 17, 1978, Or, Alternatively, For An Interlocutory Appeal, dated June 19, 1978.)

113. Kroger has represented by implication in certain Price Patrol advertisements that at the time Kroger represented that shopping at Kroger, rather than at competitors' stores, would result in lower overall expenditures, it possessed and relied upon a reasonable basis for that representation.

114. Kroger officials testified that the absence of meat and produce items was not disclosed in Price Patrol advertisements (Tr. 768–69, 1661, 1676–77, 1817, 2031, 2101, 2445; JX 2: Stec, p. 88; JX 1: Hoover, p. 55; JX 1: Pellin, p. 68). A review of the advertisements submitted by both complaint counsel and respondent confirms the

fact that the absence of meat and produce was not disclosed in the Price Patrol advertisements.

115. The use of the word "grocery" in Price Patrol advertisements does not constitute a disclosure of the exclusion of meat and produce, since "grocery" is commonly understood by consumers to mean items generally sold in a supermarket or grocery store, including meat and produce (Tr. 1117–18, also see "grocer" and "grocery" in *Webster's Third New International Dictionary of the English Language, Unabridged* (1961)).

115A. Meat comprises 21% of Kroger's sales, and produce 7% (F. 29). The sales of meat and produce are, therefore, significant (Tr. 2985). Both Kroger expert witnesses agree that the absence of meat and produce should have been disclosed in the Price Patrol advertisements (Tr. 2676, 2708–10, 2988–89).

116. Beginning in 1976, some Price Patrol newspaper advertisements included fine-print disclosures that fresh meat and produce items were not included in the Price Patrol (RX 595, 1128; Hoover, Tr. 1676–77). The Price Patrol check lists which were posted in Kroger stores and viewed by **[36]**significant numbers of consumers, did not list fresh meat and produce items. To the extent that some later Price Patrol advertisements disclosed the exclusion of meat and produce from the Price Patrol advertisements, they were made on the direction of Kroger's General Office because of a private suit in Chattannoga, Tennessee (Tr. 1677), and the present litigation involving the Federal Trade Commission (Tr. 1816–17; CXs 22, 23). After such disclosures were made in certain Price Patrol advertisements, there was no fall-off in Kroger's sales (Tr. 1870).

1. *Central Marketing Area*

117. The following advertisements from the Central Marketing Area were received into evidence:

CXs 406–409, 411–414, 422–427, 435–439;
RXs 500(3–4), 505, 518, 1111, 1112–1114.

118. None of the above advertisements for the Central Marketing Area contain a disclosure that meat and produce are excluded from the Price Patrol Survey.

119. Numerous advertisements imply that meat and produce are included in the Price Patrol Survey. For example, CXs 435 through 439 have as a banner headline: "Want to Save More Each Week on Your Food Budget?" Additionally, a picture of the Price Patrol women is captioned: "These Three Area Housewives Are Becoming

The Best Informed Experts On Food Prices In Fort Wayne." (CXs 436–439). In CXs 422–427, the headlines generally state that the "Price Patrol Proves Kroger Is The Low Price Leader," and a consumer will "save more" this week at Kroger.

2. *Dallas Marketing Area*

120. The following advertisements from the Dallas Marketing Area were received in evidence:

CXs 400–405;
RXs 595, 598–600, 609, 1123–1128. **[37]**

121. A review of the advertisements in evidence reveals that the exclusion of meat and produce was not disclosed in Price Patrol advertisements until September 27, 1976 (CXs 400–401, 404–405; RXs 598–599, 609, 1123–1127). RX 595, *Dallas Times-Herald* dated September 27, 1976, and RX 1128, *Dallas Morning News* dated October 4, 1976, contain the following disclosure:

Price Patrol checks only items which are totally or practically identical in each of the stores checked. Fresh meat, fruits and vegetables cannot be accurately compared due to variations in grades, sizes, trim, etc.

122. Some advertisements dated after September 27, 1976 and October 4, 1976 do not disclose the absence of meat and produce from the Survey. In fact, CX 402, *Dallas Morning News* dated October 21, 1976 (17 days after October 4, 1976), implies that meat is included in the Price Patrol report. The banner headline includes a reference to the Price Patrol, and the statement: "Kroger Meat Prices are Down" (CX 402). CX 403, *Dallas Morning News* dated November 4, 1976, also includes the banner headline referencing the Price Patrol in close proximity to the large typed statement, "Kroger Meat Prices are Down" (CX 403).

3. *Delta Marketing Area*

123. The following advertisements from the Delta Marketing Area were received into evidence:

CXs 428–434;
RXs 551–553, 554(1–2), 555–556, 560–563.

124. None of the above advertisements contain a disclosure that meat and produce are excluded from the Price Patrol Survey.

4. *Southland Marketing Area*

125. The following advertisements from the Southland Marketing Area were received into evidence:

CXs 415–421;
RXs 535 (536), 537 (538), 540–542, 546. [38]

126. None of the above advertisements contain a disclosure that meat and produce are excluded from the Price Patrol Survey.

127. RX 540 implies that meat and produce are included in the Price Patrol Survey. On RX 540–1 is the statement, ". . . shopping Kroger will enable you to spend less for your food than at any other store." On RX 540–2 is the statement, "They check prices on over 150 items. Not the kind of items you buy once a year, but basics. Staples, every housewife needs in her kitchen everyday . . ." "Staples" includes meat and produce (Tr. 1818).

128. Certain advertisements containing price claims made by other food retailers have been admitted into the record (RXs 801–803, 813, 830, 837–838, 840, 842, 844; Tr. 3091–92). The record is silent as to whether the claims made in these exhibits were substantiated, and, if so, on what basis.

E. *Some Effects of the Price Patrol Program*

129. The Price Patrol advertisements were run by Kroger in some areas for almost six years, *i.e.,* 1972 through 1978 (F. 105). Most other advertising programs at Kroger had a life of from three to four months (Tr. 2093–I). The primary reason for Kroger's discontinuance of the Price Patrol was the pendency of this proceeding (F. 107).

130. The Price Patrol program had a remarkably positive effect on Kroger's sales, profits, and market share. For example, in Atlanta, during the life of the Price Patrol program, sales increased significantly, Kroger's market share doubled and net profit margin also increased (Tr. 1870, 2159). Similarly, in the Dallas Marketing Area sales increased during the Price Patrol program (Tr. 770; CXs 70, 708–3). CX 15, a Kroger document entitled "The Price Patrol" (F. 27), states clearly on the cover, "The Price Patrol really works like nothing before or since . . . to *increase* sales, profits, and credibility . . . to *reduce* advertising and promotional costs." (CX 15–1; emphasis in original). The manual goes on to point out that "[t]he use of this type program will produce long term gains in share of market and profitability" (CX 15–2). The manual also attaches a sales chart from the Atlanta area (CX 15–2, 15–19). The chart shows that Kroger sales [39]per month almost doubled from the twelfth period in 1972, before

the Price Patrol started, to the twelfth period of 1974 (CX 15–19). Furthermore, an attachment to the written speech of Mr. Thomas given to the Vice Presidents of other Kroger Marketing Areas (Tr. 2093–S) shows that, by March 1974, only 16 months after the Price Patrol's introduction, Kroger sales and customer count increased substantially (CX 30–13). The Price Patrol manual also points out that, as the program matures and sales increase, the media cost, as a percentage of sales, will go down (CX 15–13). Mr. Stec confirmed that this phenomenon did indeed occur (Tr. 1836 *in camera*). The manual also states that sales in the Southland Marketing Area, other than Atlanta, "responded well and are following the same up swing as did Atlanta." (CX 15–13; see also CX 29). Mr. Thomas' discussion of the increase in net profits in Atlanta is supported by CX 15–14. The manual also supports Mr. Thomas' figures of increased market share: ". . . it continues to grow and enables Kroger to increase its market share and keep it . . ." (CX 15–14, 15–15).

131. Certain Kroger officials, particularly in the Southland Marketing Area, testified regarding the effects of the Price Patrol on competitive activity (Tr. 1678, 1768–69, 2107–08). This testimony, however, does not square with the Kroger Price Patrol manual, which states, under the heading "Competitive Activity":

> None of the competition in the markets where the Price Patrol has been introduced have changed their merchandising style. If they were a high priced feature merchant they continued this type activity and may have heated up features at the out-set to try to off-set the affects of the price patrol.
>
> If a competitor is a EDLP merchant they have made a few adjustments to the regular structure but have not met the roller program. (CX 15–15).

132. CX 16, entitled "Managing A Kroger Price Patrol Program" is a document that was disseminated to the Kroger Marketing Areas as an information guide for the Price Patrol program. The document details how to put together, run, and manage a Price Patrol campaign (Tr. 760). The document discloses that the results of the Price Patrol program tend to build gradually, rather than immediately. And the effective life of the program is such that, instead of being "worn out" **[40]**after a few months or a year, it will continue to pile up credibility and results indefinitely (CX 16–3). In areas where the Price Patrol had been run, consumer research showed high levels of public awareness and credibility (CX 16–3). The research also indicated that the Price Patrol concept attracted younger families (CX 16–3).

133. Even though meat and produce were not included in most Price Patrol checks, sales and consumer research showed that a

"hallo [sic] effect" improved Kroger's meat and produce price image as well (CX 16–3), and Kroger's experience indicated that cross-shopping is reduced, as reflected in higher average transactions (CX 16–3).

134. Mr. Charles Thomas, in his speech to other Kroger Marketing Area Vice Presidents, points out the credibility and believability of the Price Patrol Program and says that the "awareness levels for Price Patrol are extremely high." (CX 30–9).

135. Kroger's sales in Atlanta increased substantially during the Price Patrol, its market share doubled and net profits also increased (Tr. 2159). Based on an assessment of the costs of the Price Patrol in relation to the effects, Kroger was satisfied with the effectiveness of the program (Tr. 2166).

136. Campbell-Mithun, Inc., an advertising agency, conducted consumer awareness research regarding the Price Patrol in the following cities on the following dates (CX 708):

Atlanta, Georgia	August 1–6, 1973 March 18–23, 1974 April 11–16, 1976 August 2–3, 1977 November 2–4, 1977
Memphis, Tennessee	February 6–11, 1976
Albany, Georgia	First week, February 1975
Macon, Georgia	February 2–4, 1974 First week, November 1974
Augusta, Georgia	October 18–20, 1973
Nashville, Tennessee	September 20–23, 1974[41]
Indianapolis, Indiana	February 6–11, 1976
Little Rock, Arkansas	February 16–20, 1976
Carrollton, Georgia	March 27–31, 1976
Ada, Oklahoma	August 18–22, 1977
Duncan, Oklahoma	August 18–22, 1977
Athens, Georgia	October 11–17, 1975
Shreveport, Louisiana	October 31 - November 5, 1975
Dallas, Texas	October 30 - November 2, 1975; August 2–7, 1977

137. These reports show that, as of the date of the respective surveys for each city (CX 708):

(a) A majority of food shoppers were aware of the Price Patrol and identified it with Kroger (except for the Augusta, Georgia and Duncan, Oklahoma surveys).

(b) Awareness of the Price Patrol and identification of it with Kroger had increased in the following cities for the following periods:

Dallas, Texas	October 30, 1975 to August 7, 1977
Macon, Georgia	February 2, 1974 to November 1974

In Atlanta the results were as follows:

Percentage of Food Shoppers Aware of Price Patrol and Identify it with Kroger

	Aug. 1973	Mar. 1974	Apr. 1976	Aug. 1977	Nov. 1977
All shoppers	55%	67%	78%	85%	83%

[42]

(c) Of those food shoppers both aware of the Price Patrol and identifying it with Kroger, between 8% and 30% stated that they check the Price Patrol list available in the store. Between 70% and 92% stated that they did not.

(d) Of those food shoppers both aware of the Price Patrol and identifying it with Kroger, the following percentage showed an increased interest in shopping at Kroger as a result of the Price Patrol in the cities and on the dates listed:

	AT KROGER	ELSEWHERE	SHOPPERS
ATLANTA, GEORGIA			
August 1973	20%	13%	18%
March 1974	29%	10%	16%
April 1976	29%	11%	14%
August 1977		NO RESULTS	
November 1977		NO RESULTS	
MACON, GEORGIA			
February 1974	42%	NO RESULTS	25%
November 1974	26%	NO RESULTS	18%
DALLAS, TEXAS			
Oct.-Nov. 1975	14%	15%	15%
August 1977	30%	6%	9%

(e) Kroger sales increased during the period of the Price Patrol in Dallas, Texas.

138. The above awareness surveys were each made while the Price Patrol was in operation in the respective cities. They do not project the effect of the Price Patrol to periods after the date of the report (CX 708).

IV. Kroger Did Not Have A Reasonable Basis For Certain Claims Made In The Price Patrol Advertisements

A. *Deficiencies of the Price Patrol Survey*

139. Complaint counsel's expert witness, Dr. Kohout, and Mr. Oliver, respondent's expert witness on survey methodology, [43]both agree that there are recognized standards by which to assess the methodological soundness of a price survey (Tr. 1004–07, 1064, 2707).

The judgment that a survey is sound is based upon the application of accepted sampling techniques, proper statistical analysis, and the reduction of bias and random error (Tr. 1004–05, 1065, 2708). Acceptable survey procedures also dictate that the limitations of the design be clearly stated (Tr. 1064, 1066). A survey is methodologically unsound when opportunities for systematic error (bias) and random error are not eliminated to the extent practicable (Tr. 1005). Random error is due to chance, and can be reduced by increasing sample size (Tr. 1005). Systematic error, or bias, cannot be reduced by increasing sample size (Tr. 1005–06). Bias is a systematic tendency to deviate from the true population (Tr. 2708). The soundness of the Price Patrol Survey can be assessed by the degree to which bias was minimized (Tr. 2708). A survey must be evaluated in light of the claims made (Tr. 1005). As shown by the following Findings, the Price Patrol program was conducted in such a way that there were a number of systematic errors which significantly biased survey results. Dr. Kohout, complaint counsel's expert witness, testified that, when measured against acceptable survey procedures, the Price Patrol Survey was not methodologically sound (Tr. 1011).

1. *Representativeness of Items Included in the Price Patrol Survey*

140. Kroger's Price Patrol Survey excluded certain categories of items in Kroger stores, particularly meat, produce, house brands, most private label products, most direct-store-delivered items, bakery, and delicatessen items (Tr. 1120, 2708, 2854–55; F. 93).

141. Dr. Kohout testified that the exclusion of certain categories from the Survey presented a problem of representativeness (Tr. 1012, 1028), and such a survey excluding categories would not support the claim that Kroger was lower on more food items (Tr. 1029). Dr. Kohout succinctly stated the proposition: "[I]f one is to generalize to a certain population, all segments of the population have to be represented in the sample." (Tr. 1013, 1119). Mr. John Kroening, Account Executive for Campbell-Mithun, recommended against generalizing to 500 items from the Price Patrol Survey based on 150 items (CX 600).

142. Dr. Kohout also testified that the exclusion of meat and produce from the Price Patrol Survey prevented the Survey from supporting the claim that Kroger offers prices **[44]**which would result in lower overall expenditures (Tr. 1030). Such a survey would not support a conclusion that the average consumer would save money by shopping at the store (Tr. 1030, 1054–55).

143. Mr. Oliver, respondent's expert witness on survey methodology, conceded that, to get an assessment of price position across the whole range of food categories, one cannot exclude meat and produce unless Kroger's price relationship to its competitors on meat and produce was the same as its price relationship on groceries (Tr. 2708–11). Dr. Benham, respondent's expert witness, also agreed that: "If meat prices differ systematically from the prices of groceries, indeed the grocery Price Patrol items are not representative of the overall prices in the store." (Tr. 2987).

144. The price relationship between Kroger and its competitors on meat and produce did, in fact, differ systematically from Kroger's price relationship with its competitors on groceries, according to Kroger's own internal price checks.

145. Of all the Burgoyne Price Checks conducted in cities during the course of Price Patrol advertising in the Delta, Dallas, Central, and Southland KMAs, Kroger lost to (that is, Kroger had higher prices than) one or more competitors sixty (60) out of three hundred eight (308) in the Grocery category (19%); two hundred sixty-four (264) out of three hundred eight (308) in the Produce category (86%); and two hundred fifty-three (253) out of three hundred eight (308) in the Meat category (82%).

146. Of all the Burgoyne Price Checks conducted in Bloomington, Indiana during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors three (3) out of six (6) in the Grocery category, four (4) out of six (6) in the Produce category, and five (5) out of six (6) in the Meat category (CX 251).

147. Of all the Burgoyne Price Checks conducted in Ft. Wayne, Indiana during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors four (4) out of nine (9) in the Grocery category, seven (7) out of nine (9) in the Produce category, and eight (8) out of nine (9) in the Meat category (CX 252).

148. Of all the Burgoyne Price Checks conducted in Indianapolis, Indiana during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors five (5) out of twelve (12) in the Grocery category, six (6) **[45]**out of twelve (12) in the Produce category, and eleven (11) out of twelve (12) in the Meat category (CX 253).

149. Of all the Burgoyne Price Checks conducted in Kokomo, Indiana during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors three (3) out of six (6) in the Grocery category, six (6) out of six (6) in the Produce category, and five (5) out of six (6) in the Meat category (CX 254).

150. Of all the Burgoyne Price Checks conducted in Dallas, Texas

during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors six (6) out of twenty-one (21) in the Grocery category, twenty-one (21) out of twenty-one (21) in the Produce category, and fourteen (14) out of twenty-one (21) in the Meat category (CX 256).

151. Of all the Burgoyne Price Checks conducted in Sherman/Denison, Texas during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors one (1) out of eleven (11) in the Grocery category, ten (10) out of eleven (11) in the Produce category, and four (4) out of eleven (11) in the Meat category (CX 257).

152. Of all the Burgoyne Price Checks conducted in Ft. Worth, Texas during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors none of the eleven (11) in the Grocery category, eleven (11) out of eleven (11) in the Produce category, and seven (7) out of eleven (11) in the Meat category (CX 258).

153. Of all the Burgoyne Price Checks conducted in Shreveport, Louisiana during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors one (1) out of twelve (12) in the Grocery category, ten (10) out of twelve (12) in the Produce category, and twelve (12) out of twelve (12) in the Meat category (CX 259).

154. Of all the Burgoyne Price Checks conducted in Ft. Smith, Arkansas during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors one (1) out of nine (9) in the Grocery category, nine (9) out of nine (9) in the Produce category, and five (5) out of nine (9) in the Meat category (CX 260).

155. Of all the Burgoyne Price Checks conducted in Jackson, Mississippi during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors **[46]**none of the six (6) in the Grocery category, six (6) out of six (6) in the Produce category, and four (4) out of six (6) in the Meat category (CX 261).

156. Of all the Burgoyne Price Checks conducted in Little Rock, Arkansas during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors ten (10) out of thirteen (13) in the Grocery category, twelve (12) out of thirteen (13) in the Produce category, and ten (10) out of thirteen (13) in the Meat category (CX 262).

157. Of all the Burgoyne Price Checks conducted in Memphis, Tennessee during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors none of the nine (9) in

the Grocery category, eight (8) out of nine (9) in the Produce category, and nine (9) out of nine (9) in the Meat category (CX 263).

158. Of all the Burgoyne Price Checks conducted in Pine Bluff, Arkansas during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors none of the nine (9) in the Grocery category, eight (8) out of nine (9) in the Produce category, and seven (7) out of nine (9) in the Meat category (CX 264).

159. Of all the Burgoyne Price Checks conducted in Atlanta, Georgia during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors eleven (11) out of twenty-five (25) in the Grocery category, seventeen (17) out of twenty-five (25) in the Produce category, and twenty (20) out of twenty-five (25) in the Meat category (CX 274).

160. Of all the Burgoyne Price Checks conducted in Augusta, Georgia during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors three (3) out of sixteen (16) in the Grocery category, fifteen (15) out of sixteen (16) in the Produce category, and thirteen (13) of fifteen (15) in the Meat category (CX 275).

161. Of all the Burgoyne Price Checks conducted in Bowling Green (Southland KMA) during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors none of the thirteen (13) in the Grocery category, thirteen (13) out of thirteen (13) in the Produce category, and thirteen (13) out of thirteen (13) in the Meat category (CX 276).

162. Of all the Burgoyne Price Checks conducted in Chattanooga, Tennessee during the course of the Price [47]Patrol advertising campaign, Kroger lost to one or more competitors three (3) out of twenty-one (21) in the Grocery category, nineteen (19) out of twenty-one (21) in the Produce category, and nineteen (19) out of twenty-one (21) in the Meat category (CX 277).

163. Of all the Burgoyne Price Checks conducted in Florence/Sheffield, Louisiana during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors two (2) out of twelve (12) in the Grocery category, eight (8) out of twelve (12) in the Produce category, and eight (8) out twelve (12) in the Meat category (CX 278).

164. Of all the Burgoyne Price Checks conducted in Huntsville, Alabama during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors none of the thirteen (13) in the Grocery category, seven (7) out of thirteen (13) in the Produce category, and nine (9) out of thirteen (13) in the Meat category (CX 279).

165. Of all the Burgoyne Price Checks conducted in Knoxville, Tennessee during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors two (2) out of thirty-seven (37) in the Grocery category, thirty-five (35) out of thirty-seven (37) in the Produce category, and thirty-six (36) out of thirty-seven (37) in the Meat category (CX 280).

166. Of all the Burgoyne Price Checks conducted in Macon, Georgia during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors none of the fifteen (15) in the Grocery category, eleven (11) out of fifteen (15) in the Produce category, and fourteen (14) out of fifteen (15) in the Meat category (CX 281).

167. Of all the Burgoyne Price Checks conducted in Nashville, Tennessee during the course of the Price Patrol advertising campaign, Kroger lost to one or more competitors six (6) out of twenty-two (22) in the Grocery category, twenty-one (21) out of twenty-two (22) in the Produce category, and twenty-one (21) out of twenty-two (22) in the Meat category (CX 282).

168. Mr. Oliver sponsored respondent's exhibits RXs 920–924 (Tr. 2609–12, 2634). These exhibits purport to show that "Price Patrol items were fairly well distributed throughout the grocery department of Kroger." [48](Tr. 2634). These exhibits, of course, exclude meat, produce, and delicatessen items (Tr. 2745–46). These exhibits do not show the representativeness of the Price Patrol item as a percentage of sales throughout the grocery department (Tr. 2749). Furthermore, Mr. Oliver combined Price Patrol lists for his analysis (Tr. 2749) and RXs 920–924 do not show how representative the Price Patrol list was for the one week it was checked (Tr. 2749).

169. The selection of a survey sample by informed judgment and expertise is a short cut generally recognized in the field of survey design (Oliver, Tr. 2660–66; Benham, Tr. 2827, 2832, 2841–44, 2847–51, 2860–64; Kohout, Tr. 1154–58). Judgment samples are samples drawn on the basis of informed judgment and expertise rather than random sample methodology (Oliver, Tr. 2660–61; Kohout, Tr. 1301, 1314). As such, the findings derived from data obtained through the use of judgment sample is not projectible to any general population. However, the results of judgment sample surveys may provide useful insights into true facts or useful broad guides to decisionmaking (Tr. 2661–64, 2827, 2838, 2841–44, 2847–51, 2660–64, 3083).

170. The results of judgment samples are commonly used by business, labor, government agencies, and researchers as convenient aids to decisionmaking (Oliver, Tr. 2666; Benham, Tr. 2826–27, 2832, 2841–44, 2847–51, 2860–64).

171. Judgment sampling methodology seeks to bring the accumulated knowledge and insight of experts to bear in constructing a survey sample and in evaluating the resulting survey data (Oliver, Tr. 2668, 2695–96, 2715–16).

172. Another aspect of judgment sampling is that, depending upon the purpose in view, it may resolve problems which prove difficult when random sampling methodology is employed (Oliver, Tr. 2647–49, 2782–83; Benham, Tr. 2889, 2893–94).

173. Another aspect of judgment sampling is that the costs are substantially less than the costs of random sample methodology (Oliver, Tr. 2641–42; Benham, Tr. 2889, 2893–94).

174. Experienced survey researchers often must give careful consideration to tradeoffs among practicality, feasibility, cost, and the expected quality and importance of the information produced by alternative survey methodologies, having in mind the use to which the survey is to be put (Benham, Tr. 2885–95). **[49]**

175. It is the opinion of respondent's experts that judgment sample methodology is useful for conducting retail food price surveys (Oliver, Tr. 2647–49, 2715; Benham, Tr. 2863–64) and that the accumulated knowledge and insight of persons experienced in food retailing can be brought to bear on constructing a judgment sample and evaluating its results (Oliver, Tr. 2668, 2670, 2715–16).

176. According to Mr. Oliver, the use of judgment samples for conducting retail food price surveys avoids the difficult methodological problems caused by quality differences among items between stores and nonavailability of comparable items between stores and is reasonable under the circumstances (Oliver, Tr. 2643, 2645, 2647–50, 2782–83).

177. The Price Patrol Survey is a judgment sample survey and, as such, could have provided Kroger a convenient and inexpensive shorthand device for obtaining further clue to its true competitive position, when evaluated in conjunction with Kroger's other price checks, including Full Book Checks and Burgoyne Checks.

2. *Failure to State Limitations of the Price Patrol Survey Design*

178. All three experts testifying on survey methodology were unanimous that the systematic exclusion of fresh meat and produce from the Price Patrol Survey should have been stated as a limitation in the survey design in all Price Patrol advertisements (Tr. 1066, 2709, 2988–89).

3. *Systematic Inclusion of Reduced-Price Items in the Price Patrol Survey*

179. The Price Patrol Survey had a far greater representation of roller items in the store. Additionally, the merchandiser selecting the Price Patrol items was aware of which items were rollers. The criteria were the same for selecting items as rollers and for selecting items to be included on the Price Patrol Survey (Tr. 1675–76; F. 34–35, *supra*). One grocery merchandiser regularly placed 20 to 40 items on the Price Patrol list precisely because they were rollers (F. 95, *supra*).

180. Dr. Kohout testified that a systematic inclusion of roller items on the Price Patrol lists presents a bias and reasonable steps should have been taken to eliminate **[50]**that bias (Tr. 1033). Dr. Kohout explained that there can be bias in the procedures or in the results of a survey. Bias in procedures may not always show up in the results (Tr. 1143). He further testified that knowledge of roller items and inclusion of rollers on the Price Patrol is a source of bias that should have been eliminated, even if the rollers were not over-represented (Tr. 1035, 1039). Dr. Kohout suggested that, if the selection of Price Patrol items were done randomly or by an outside source, this bias might be eliminated (Tr. 1037). "But someone who has a personal interest in the outcome, a personal interest in supporting the hypothesis, putting them on, it's just inherently wrong." (Tr. 1037).

181. Dr. Kohout further testified that the over-representation of rollers on the Price Patrol inflates the result of the estimate of the number of items that Kroger is lower on (Tr. 1034), and the Price Patrol would, therefore, not be representative of the total population (Tr. 1035). Mr. Oliver, Kroger's own witness, agreed that one expects rollers to be over-represented on the Price Patrol, and that such over-representation biases the results in favor of Kroger (Tr. 2735). The Price Patrol Survey was biased with respect to roller items because of the manner in which those items were placed on the Price Patrol Survey lists, and also because those items were over-represented in relation to their actual proportion in the population (Tr. 1130–32, 1135, 1137–39).

4. *Use of High-Volume Items*

182. Kroger selects high-volume, fast-moving items for the Price Patrol. Dr. Kohout testified that this procedure is unsound (Tr. 1011–12, 1039) because the fast-moving items comprise a minority of the Grocery category in terms of sales (Tr. 1039–43; CX 803). RX 979

supports Dr. Kohout's proposition that Price Patrol items represent a minority of grocery items (18.9%), and only 11.2% of total store sales (RX 979).

5. *Grocery Merchandisers who Selected Price Patrol Items Also Priced Items*

183. Grocery merchandisers who selected items for the Price Patrol lists (F. 64; Tr. 2713) also had the responsibility for pricing those same items (F. 33; Tr. 2713). [51]

183A. The instruction manual for conducting the Price Patrol in the Delta Marketing Area states, under a general heading, "Mechanics of Handling Price Patrol":

> C. Price Patrol Checks.
>
> 3. Grocery Merchandising will be responsible for being favorably competitive in all price checks. *Individual store managers will be responsible for correct pricing at store level according to the latest information from Grocery Merchandising.* (CX 75–13. Emphasis in original).

184. Dr. Kohout testified that combining the dual functions of pricing and selecting items to be included in the survey increase the potential for biased item selection (Tr. 1043–44), and the procedure is unsound, based on accepted principles or survey methodology (Tr. 1011–12). Dr. Kohout would not change his opinion, even if the grocery merchandiser did not know which actual Price Patrol list was to be used in any given week (Tr. 1046). Both of respondent's expert witnesses Mr. Oliver and Dr. Benham agreed that bias was introduced by permitting the person to price items and select items for the Price Patrol Survey, and would have recommended separating these functions (Tr. 2713, 2989). Dr. Benham noted that it is important to separate these functions since bias may be introduced consciously or unconsciously (Tr. 2989–90).

6. *The Price Patrol Survey Sample Was Not A Representative Sample*

185. The grocery merchandiser did not select the items for inclusion in the Price Patrol on a random basis (F. 64–66, *supra;* Tr. 2712).

186. The standard procedure for drawing a sample is to draw as many as possible in a neutral fashion, or to do so randomly so that there would be some assurance that the selection is done blindly (Tr. 1043). If one has a stake in the survey outcome, the usual procedure is either random sampling, or somehow to make that selection blind,

neutral (Tr. 1043–44). If the sample is not selected randomly, it must be chosen by an independent third party who has no stake in the outcome of the survey (Tr. 1066, 2715–16). **[52]**

187. Random sampling makes it possible to make judgments about the efficiency or precision of the sample. Dr. Kohout testified that the absence of a random selection meant that each item in the store did not have a proportionate chance of being selected on the Price Patrol (Tr. 1048), and that, therefore, generalization based on probability theory cannot be made from such a survey (Tr. 1047–48).

7. *Presentation Format Used in the Price Patrol Advertisements*

188. The Price Patrol Surveys were recapped and advertised in the form of a box score listing the number of items Kroger was higher on, lower than, or the same on price as its listed competitors. This box score did not list the prices of the items, nor did the chart summarize the total dollar costs of the items included.

189. Dr. Kohout testified that presenting the Survey results viewed in terms of the number of lower, number of higher, and number of same would not support *any* conclusion about whether or not consumers would save money at that store (Tr. 1051–52). Dr. Kohout points out that it is possible to have higher prices overall and still come out with more lower-priced items on the Survey (Tr. 1052).

190. Mr. Dean Hicks, who worked in the grocery business for 27 years, stated in discussing Full Book Recaps (CX 220) that, based on the higher-than, lower-than, or same-as format, even he could not tell which store is the cheapest place to shop (Tr. 2435). Mr. Oliver, respondent's expert witness, stated that consumers would be primarily interested in the amount of money which would be saved, and would find price information more useful than the number of items priced lower at a given store (Tr. 2766, 2770). Respondent prepared an exhibit costing out the items on the Price Patrol Survey for the week ending January 14, 1978 in Dallas (RX 965). Respondent does not contend that this exhibit is representative of other checks on other dates in other cities (Tr. 2765). Mr. Oliver admitted that the box score item results overstated the dollar differences between Kroger and its competitors (Tr. 2766). For example, the item count in RX 965 showed Kroger winning by a 4 to 1 ratio, while the dollar difference was only 1.01 to 1 (Tr. 2769–70). **[53]**

8. *Weighting*

191. The Price Patrol Survey was not weighted (Tr. 2730–31).

192. "Weighting" is a process of statistically adjusting the

sample to make it more representative (Tr. 1053). It is possible to design a self-weighted sample by assigning differential probabilities to each item in the sample population. Dr. Kohout testified that weighting involves statistically adjusting the sample to make it more representative (Tr. 1053). This weighting is necessary to make the Price Patrol Survey methodologically sound (Tr. 1012, 1052–53).

193. Factors necessary for weighting a survey which is designed to answer the question of which competitor offered prices resulting in lower overall expenditures, are the price and the average consumer expenditures by category of item (Tr. 1053, 2732–33, 2990). Basically, Dr. Kohout would recommend weighting the items to take into account the frequency of purchase, and possibly the proportion spent in various categories (Tr. 1053–54). Mr. Oliver and Dr. Benham concurred with the proposition that weighting would have improved the reliability of the Price Patrol Survey (Tr. 2731, 2992).

9. *The Price Patrol Survey Did Not Support The Generalizations in Price Patrol Advertisements*

194. Conclusions of the Price Patrol Survey could not be generalized beyond the 150 items actually checked in the Survey (Tr. 1146). Furthermore, any claim limited to the 150 items surveyed must disclose that these items constitute a hand-picked sample (Tr. 1148–49).

195. Dr. Kohout testified further that the various deficiencies in the Price Patrol Survey lead to the conclusion that the Price Patrol Survey was not a methodologically sound survey (Tr. 1011–12, 1054, 1119).

196. Even if the only deficiency of the Price Patrol were the exclusion of meat and produce, the survey could not answer the question of whether Kroger offered prices which resulted in lower overall expenditures (Tr. 1084–85), nor could it answer the question of whether most items in Kroger stores are lower than items in competitors' stores **[54]**(Tr. 1085–86). "If we exclude the meat and produce categories, assuming that all other sources of bias could be controlled, we're still generalizing beyond what we could support" (Tr. 1085).

197. Even if the only deficiency of the Price Patrol Survey were the fact that the criteria for the selection of Price Patrol items was the same as the criteria for selection of rollers, the Price Patrol Survey could not answer the question of which store offered prices which would result in lower overall expenditures (Tr. 1087–88).

198. Dr. Kohout also stated in summary that the Price Patrol

Survey could not support a conclusion showing which competitor had prices which resulted in lower overall expenditures (Tr. 1054–55), nor could the Price Patrol support a conclusion that most items in Kroger stores are priced lower than in competitors' stores (Tr. 1057–58).

10. *Indiana Public Interest Group (INPIRG) Study*

199. The Indiana Public Interest Group (INPIRG) began a study of the Price Patrol program in Indianapolis during the fall of 1975 in order to determine the reliability of the Price Patrol program (Tr. 455). INPIRG focused on price increases and decreases before an item appeared on the Survey (Tr. 456–57). In analyzing the raw data gathered by INPIRG, Professor Kleyle, an expert in statistical techniques, performed a Chi-square analysis of the data (Tr. 588–89). The value of the Chi-square indicates whether there is an association between the observed and the expected values. In the case of the Price Patrol, there were fewer Price Patrol items showing price increases than one would expect (Tr. 604). The number of items on the Price Patrol showing price decreases was larger than expected. And the high Chi-square results indicate that the likelihood of these changes being due to chance alone is extremely small (Tr. 593–96). Dr. Kleyle concluded that, because of the high Chi-square values, it is extremely unlikely that these variables of classification, that is whether an item was on a current Price Patrol list and whether the price of the item increased or decreased from the previous week (Tr. 594), are not associated. **[55]**

B. *Kroger Did Not Rely on its Other Price Checks As Substantiation for Claims Made in Price Patrol Advertisements*

1. *Full Book Checks*

200. Kroger Marketing Area price-checking personnel conduct a price survey of approximately 2,000 to 4,000 items in a Kroger store and the stores of certain competitors (Tr. 2345–46; JX 2: Hoover, pp. 151, 153; JX 1: Crague, p. 46; JX 1: Hoover, pp. 28, 30). This check is commonly referred to as a Full Book Check (Tr. 775, 797, 1564, 2002; JX 1: Pellin, pp. 73, 75–76; JX 1: Crague, p. 44). The Full Book Check results were summarized under the following headings: Grocery, Dairy, Frozen Food, DSD (direct store delivered items), H&BA (health and beauty aids), Total Grocery, Top 200 (or Top 500), and occasionally Produce, Meat (CXs 201–11, 220–26; see also, RXs 947–964).

201. The Full Book Check is generally conducted at least once a quarter (Tr. 2112, 2342), and, in some areas, every four to five weeks (Tr. 1570, 1653; JX 2: Hoover, p. 151). The results of the Full Book Check are summarized in the format "higher than," "lower than," or "the same as" (*e.g.,* CX 201; Tr. 1929–30), which is the same format used in the Price Patrol summaries (*e.g.,* CX 125; JX 1: Pellin, p. 76). The Full Book Check (CXs 24–3, 25–3) must be submitted once a quarter to Kroger's General Office (Tr. 1570, 1613, 2100, 2342, 2348). CXs 209 and 210 are typical examples of Full Book Recaps submitted to Kroger's General Office (Tr. 2344).

202. The Full Book survey checked major Kroger competitors (JX 2: Hoover, pp. 151–52; Tr. 1565, 2345), and was used to determine Kroger's competitive price position in the market (Tr. 1564, 1570; JX 1: Pellin, p. 75; Tr. 2132, 2137, 2407).

203. The Full Book Price Checks sometimes include meat (Tr. 1927, 2346; JX 1: Crague, p. 50), produce (Tr. 2003, 2346; JX 1: Crague, p. 50), and private label items (Tr. 2347). Mr. Vaughn testified that approximately 30 to 50 fresh meat items are checked on the Full Book (Tr. 1928). He said that they attempt to include the basic meat cuts from each major meat commodity, including such items as chuck steak, ground beef, rib eye steak, quarter pork loins, and center chops (Tr. 1928). The Kroger meat merchandiser or his merchandising representatives does the actual checking **[56]**(Tr. 1928). Dr. Bere testified that between 50 and 80 produce items are checked on the Full Book by either the Kroger produce merchandiser or his merchandising representative (Tr. 2003–04, 2032).

204. During the course of the Price Patrol advertising campaign, Full Book Checks were conducted in certain cities in the Central, Dallas, Delta, and Southland Marketing Areas (CX 200; RX 978).

205. Full Book results are not regularly compared with Price Patrol results (JX 1: Hoover, pp. 30, 46; JX 2: Hoover, p. 184).

206. Key Kroger officials testified that the Full Book Checks were not relied upon as substantiation for any Kroger advertising (Tr. 783–84, 1656, 1671, 1823–26; JX 1: Hoover, pp. 30, 39, 46; JX 2: Hoover, p. 184). Mr. Helmsing testified that Full Book Checks have nothing to do with Price Patrol advertisements (Tr. 783–84). Mr. Hoover stated:

> Q. . . . My understanding is that the Full Book was not used in any way in the advertising. Is that correct?
>
> A. That's correct.
>
> Q. My understanding is also that you did not rely on the Full Book for your advertising. Isn't that correct?
>
> A. That is correct. (Tr. 1656)

Mr. Stec was asked the following question:

Were the advertising claims based in any way upon the full-book checks? . . . . (Tr. 1823)

He answered:

No, they were not based on the full-book checks. (Tr. 1823)

207. The Full Book Checks could not, in any event, have been used to substantiate the weekly Price Patrol claims (Tr. 1653; F. 208–214, *infra*).

208. The Price Patrol checks were conducted weekly (CX 5–3), while the Full Book Checks were conducted only **[57]**once every four to five weeks (Tr. 1653, 2166–67, 2169). Mr. Vaughn and Mr. Hoover testified that meat and grocery prices change rapidly (Tr. 1659, 1947), and Mr. Thomas testified that the only weekly price check that was conducted by Kroger on a regular basis was the Price Patrol Survey (Tr. 2169). Dr. Kohout correctly noted that Full Book Checks conducted every three or four weeks could not support a weekly price claim (Tr. 1059–60). Kroger's own documents recognize that Price Patrol advertising claims could only be supported by weekly price checks (CXs 16–5, 73–5).

209. The Full Book Checks could not have been relied upon as substantiation for certain Price Patrol advertisements because, in certain cities where the Price Patrol program was conducted, no Full Book Checks were made (Tr. 2429). For example, RX 978 shows that Full Book Checks were not made in cities such as Kokomo, Pine Bluff, Florence/Sheffield, Bowling Green, and Duncan (RX 978, pp. 1–2). These same cities ran the Price Patrol program (RX 900). CX 814 shows that only the Price Patrol, and no other check, was conducted in 43 cities in the Delta Marketing Area (Tr. 1332–33). Mr. Oliver, Kroger's expert witness, confirmed that Full Book Checks were not conducted in 20% of the areas where the Price Patrol was run (Tr. 2786).

210. The Full Book Checks could not have been relied upon as substantiation for certain Price Patrol advertisements, because, in certain cities where both checks were conducted, the competitors checked differed. Mr. Pellin stated that the same competitors are not checked on both checks (JX 1: Pellin, pp. 75–76). Mr. Helmsing pointed out that eight competitors were checked on the Price Patrol in Dallas (CX 401), while only five competitors were checked on the corresponding Full Book Check (CX 204). From at least November 24, 1975 to August 23, 1976, Kroger checked Treasure Island on its Full Book Checks in Atlanta, Georgia (CX 220–12 to 220–15; Tr.

2430–32). For the corresponding period of Price Patrol Surveys, Treasure Island was not checked on any Price Patrol (Tr. 2433). Treasure Island beat Kroger on three of the four Full Book Checks (CX 220–12, 220–13, 220–15).

211. In Atlanta, Georgia, the Price Patrol Survey for the week ending December 20, 1975, indicated that eight competitors were checked by the Price Patrol (CX 415). The closest Full Book Check, however, from November 24, 1975, only checked three competitors (CX 220–12). The Price Patrol advertisement for December 20, 1975 contained in part, [58]the following message: "162 WEEKS OF CHECKING . . . SHOWS KROGER IS THE LOW PRICE LEADER" (CX 415), when Kroger's Full Book Check (CX 220–12) shows that Treasure Island beat Kroger (had more lower prices (Tr. 2141–44, 2431–32)) in the Grocery and Total Grocery categories.

212. In Indianapolis, Indiana on January 28, 1976, the Price Patrol advertisement indicated that a total of seven competitors were checked by the Price Patrol (CX 422), while the closest Full Book Check for that period, January 5, 1976, showed that only five competitors were checked (CX 201–3). The Price Patrol advertisement (CX 423) contained, in part, the following message: "21 Straight Weeks The Low Price Leader Proven Week After Week by The Price Patrol," when the closest Full Book Check, dated within four weeks of the Price Patrol Survey, showed that Marsh beat Kroger in both the Grocery and Total Grocery categories (CX 201–3).

213. The Full Book Checks could not have been relied upon as substantiation for certain Price Patrol advertisements because certain Full Book results were inconsistent with the Price Patrol claims. Mr. Thomas testified that, from December 1972 until early 1978, each weekly Price Patrol Survey result in Atlanta showed Kroger winning the Price Patrol (Tr. 2140). Mr. Thomas also testified that Kroger lost Full Book Checks in Atlanta during this same period of time (Tr. 2141–42). RX 947 shows that fourteen (14) Full Book Checks were made in Atlanta from 1973 through 1976 (RX 947–1, 947–2). Of these fourteen (14) Full Book Checks, Kroger lost to one or more competitors eleven (11) times (RX 947–1, 947–2). Even assuming that Kroger exhibits RXs 947–964 (Summary of Full Book Survey Results) generally agreed with Price Patrol results, these exhibits could not be used to support the representations made in Kroger's Price Patrol advertisements, since the exhibits show that frequently meat and produce were not included on the Full Book Checks (RXs 947–964. See, *e.g.,* RXs 947–4, 947–5 and 948–4, 948–5). CX 813 shows numerous instances where the Full Book results were inconsistent with Price Patrol claims (Tr. 1342–55).

214. Dr. Kohout was of the opinion that Kroger Full Book Checks would not support a conclusion as to which competitor had prices which would result in lower overall expenditures (Tr. 1057–58). His conclusion was based on the fact that the format—higher than, lower than, same as (*e.g.*, CX 201)—was not in the form of prices (Tr. [59] 1057–59), *i.e.*, not in dollars and cents (Tr. 1059). Dr. Kohout further pointed out that Full Book Checks, conducted every three or four weeks, could not support a weekly claim (Tr. 1059–60). Dr. Kohout also testified that a Full Book Price Check would not support a claim of Kroger having more lower prices than its competitors (Tr. 1060), unless the competitors checked on the Full Book Check were chosen randomly or represented a full census of the competitor population (Tr. 1060–61).

2. *Burgoyne Checks*

215. Burgoyne, Inc. is a marketing research firm headquartered in Cincinnati, Ohio, which was employed by Kroger to conduct price checks in certain cities (JX 2: Ticeson, p. 61; Tr. 2321). Kroger wanted an independent agency to make the checks (Tr. 2320). The Burgoyne Price Checks were started in January of 1973 (Tr. 2322–23). Presently, the checks are conducted in over one hundred cities (Tr. 2323). The Burgoyne Check is frequently referred to as a market basket- or a shopping basket-type of check (Tr. 2320, 2323). The individual checks are generally conducted once a quarter or four times per year (Tr. 2112, 2323), and are scheduled by the Kroger Central Office (Tr. 1571–72, 2323). The individual KMAs did not know in advance when the Burgoyne Check was to be conducted in its area (Tr. 2323). The Kroger Central Office also selects which stores will be surveyed; a Kroger store and certain competitors' stores (Tr. 2323–24). Kroger picked the items to be surveyed (Tr. 2326; JX 1: Crague, p. 51). Competitors checked include the price leaders as identified by the various KMAs (Tr. 2324).

216. The Burgoyne Check consists essentially of three parts: grocery, produce, and meat (Tr. 1958, 2002, 2041, 2325). There is a further breakdown for health and beauty aids within the grocery check (Tr. 2325), and the items tend to be national brands and certain commodity-type items (Tr. 2325). The category titled "Total" on the Burgoyne recap is computed by summing the retail prices from the other categories (Tr. 2329). Grocery items were selected to be representative of the product mix on the grocery commodity analysis (Tr. 2326). About thirty items are included in the produce section of the check, and these items are selected by the produce

merchandising department at the General Office (Tr. 2330). These items are also selected to be representative of the sales for each of the major categories within the produce department (Tr. 2330). **[60]** Certain of the produce items are weighted to make that item representative of the category sales within produce (Tr. 2330). Approximately forty items are included on the meat portion of the check (Tr. 2332). These items are selected by Kroger's Central Office Meat Merchandising Department, and the items are weighted to have a proportionate relationship to the Kroger meat product mix (Tr. 2332–33). Kroger's ability to properly weight the Burgoyne Check is shown by RX 967, wherein respondent compared the actual weighting of the Burgoyne Check to the weights used for the Consumer Price Index, December 1977 (RX 967, p. 2). The results are substantially similar (RX 967).

217. The Burgoyne price checkers are either Burgoyne employees or agents of Burgoyne (Tr. 2325).

218. After the checks are made and returned to Kroger, the prices of grocery items are totaled (Tr. 2329–30), the prices of produce items are totaled, and then factored to represent 7%–8% of total store sales (Tr. 2332), and the prices of meat items are totaled, and then factored to represent approximately 20% of the total store sales (Tr. 2134, 2334). The totals are then transferred to a recap sheet (Tr. 2334). RX 975 is a typical Burgoyne Check, and page 1 of that exhibit is the recap sheet (Tr. 2321–22).

219. Mr. Charles Thomas explained how he analyzed the results of a typical Burgoyne recap sheet (CX 274–8; Tr. 2133). For example, Mr. Thomas looked at CX 274–2, and from the face of that recapped check, he concluded that Kroger lost in the Grocery category to Treasure Island (Tr. 2135). A loss on a Burgoyne Check occurs when Kroger shows a larger total dollar amount on the face of a recapped Burgoyne Check (Tr. 2135).

220. The Burgoyne Checks are made to verify Kroger's competitive posture in each of the areas where the checks are conducted (JX 2: Ticeson, p. 62; JX 2: Ticeson, p. 74; JX 2: Stec, p. 97; Tr. 1960, 2132). The results of the Burgoyne Check, however, are not disclosed to consumers (Tr. 2170). Burgoyne Checks are not regularly seen by the advertising managers in the various KMAs (JX 1: Stec, p. 92; JX 1: McDaniels, p. 24).

221. Burgoyne Checks are not used for advertising (JX 1: Hoover, p. 63; JX 1: Pellin, p. 82; JX 2: Ticeson, p. 68; Tr. 1614, 1823). The Burgoyne Check results are not compared with the Price Patrol results (JX 2: Ticeson, pp. 68–69; Tr. 1612, 1672; see, CX 61). **[61]**

222. Key Kroger officials testified that the Burgoyne Checks

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were not relied upon as substantiation for any of Kroger's advertising claims (JX 2: Ticeson, pp. 68–69; JX 1: Stec, pp. 91–92; JX 1: Hoover, p. 63; JX 2: Stec, p. 107).

223. Mr. Helmsing testified that only the Price Patrol Surveys were relied upon as substantiation for Price Patrol advertisements in the Central and Dallas Marketing Areas (Tr. 783). Mr. Hoover, and Mr. Stec confirmed that the Burgoyne Checks were not relied upon as substantiation for Price Patrol advertising in the Southland Marketing Area (Tr. 1672–73, 1823; JX 1: Hoover, p. 39; JX 1: Stec, p. 92; JX 2: Stec, p. 107). Mr. David Ticeson/Tyson, who was the Kroger official reponsible for the rescheduling and the coordination and tabulation of the Burgoyne Checks (JX 2: Ticeson, p. 60), states:

Q. Okay. Those checks have nothing to do with the Kroger advertising program, do they?

A. No, sir, they do not. (JX 2: Ticeson, p. 68).

Q. Are they used to verify whether the Price Patrol reports are getting accurate information on their surveys?

A. No, sir, they are not. (JX 2: Ticeson, p. 68).

Mr. Dean Hicks, Kroger's Vice President of Marketing Administration (Tr. 2306) with primary responsibility for the Burgoyne Checks at Kroger (Tr. 2426), confirmed that the Burgoyne Check was not actually used by Kroger to substantiate its advertisements (Tr. 2426).

224. The Burgoyne Checks could not have been relied upon as substantiation for Price Patrol advertisements (JX 1: Stec, p. 92) because the Burgoyne Checks were made approximately four times a year (Tr. 2112) while the Price Patrol advertisements were run weekly (Tr. 1653, 1844, 2166–67, 2439). Mr. Charles Thomas, Kroger Corporate Vice President, testified that the only weekly price check that was conducted by Kroger on a regular basis was the Price Patrol Survey (Tr. 2169). Mr. Thomas further testified that the only price check referenced in Price Patrol advertisements was the Price Patrol Survey, and consumers would have no way of knowing **[62]**anything about Kroger's Full Book or Burgoyne Checks (Tr. 2169–70).

225. Mr. Ted Hoover testified that 500 to 700 grocery items change in price each week (Tr. 1659), and Mr. Vaughn testified that prices of fresh meat change rapidly (Tr. 1947). Dr. Kohout stated that, in his opinion, the Burgoyne Check could not support a weekly claim (Tr. 1060–63). Mr. Hoover, testified that the Burgoyne Check was outdated by the time he saw the results (Tr. 1658).

226. Furthermore, in certain cities where the Price Patrol program was conducted, no Burgoyne Checks were made (Tr. 2429). For example, respondent's exhibit RX 978 shows that Burgoyne Checks were not made in cities such as Ada, Lawton, Duncan, Tyler,

Weatherford, Longview, Carrollton, and Albany (RX 978, pp. 1–2). These same cities ran the Price Patrol program (RX 900). CX 814 shows that only the Price Patrol, and no other check, was conducted in 43 cities in the Delta Marketing Area (Tr. 1332–33). Mr. Oliver, Kroger's expert witness, confirmed that Burgoyne Checks were not conducted in 20% of the areas where the Price Patrol was run (Tr. 2786).

227. The Burgoyne Checks could not have been relied upon as substantiation for certain Price Patrol advertisements because, in certain cities where both checks were conducted, the competitors checked differed. For example, in Nashville, Tennessee on June 22, 1974, the Price Patrol checked the following competitors: Giant Foods, H. G. Hills, A&P, Food Town, Cooper Martin, and Big Star (RX 905). The closest Burgoyne Check (CX 282–22), June 27, 1974, checked the following competitors: Giant Foods, H. G. Hills, A&P, Cooper Martin, Sunflower, and K-Mart. The Price Patrol showed Kroger lower than every competitor checked (RX 905), while one of the stores (K-Mart), omitted from the Price Patrol Survey, beat Kroger on the Burgoyne Check (CX 282–22).

228. In Indianapolis, Indiana on March 13, 1976, the Price Patrol checked the following competitors: Standard Del Farm, A&P, Thrif-T-Mart, Eisner, K-Mart, Marsh, and Preston Safeway (CX 125). The nearest dated Burgoyne Check, March 3, 1976 (CX 253–7), checked the following competitors: Marsh, A&P, Eisner, Standard, K-Mart, and Thrif-T-Mart. The Price Patrol again showed Kroger lower than every competitor checked (CX 125), while the Burgoyne Check showed that Kroger was higher when compared to A&P and K-Mart (CX 253–7). In Bloomington, Indiana on January 31, 1976, the Price Patrol checked the following competitors: A&P, **[63]**Standard, Thrif-T-Mart, I.G.A., Marsh, and Eisner (CX 131). The nearest dated Burgoyne Check, January 16, 1976 (CX 251–4), checked the following competitors: Marsh, Thrif-T-Mart, Eisner, Standard, and A&P (CX 251–4). Again the Price Patrol showed Kroger lower than every competitor checked (CX 125), while the Burgoyne Check showed that Kroger was higher when compared to Standard (CX 251–4).

229. The Burgoyne Checks could not have been relied upon as substantiation for certain Price Patrol advertisements because certain Burgoyne Check results were inconsistent with the results of the Price Patrol. Mr. Thomas testified that, from December 1972 until early 1978, each weekly Price Patrol Survey result in Atlanta showed Kroger winning the Price Patrol (Tr. 2140). Mr. Thomas also testified that, during the same time, certain Burgoyne Checks showed Kroger losing to one or more competitors on that check (Tr.

2140–43). A review of Burgoyne Checks conducted in Atlanta during the period 1972 through 1978 shows numerous instances of Kroger losing to one or more competitors (CX 274–1 to 274–25; RX 925–1 to 925–3). Furthermore, Mr. Willie L. Greene testified that CX 813 showed numerous instances where the Burgoyne results were inconsistent with Price Patrol claims (Tr. 1342–55).

230. The annual cost to Kroger of conducting Burgoyne surveys weekly in 100 markets would be about $644,020 (RX 976; Hicks, Tr. 2337–38). This estimate is conservative because it excludes existing overhead costs such as Mr. Hicks' time, the time of other personnel who regularly evaluate the Burgoyne results, office space and similar administrative expense, as well as the substantial increase in working staff, management personnel and other resources which would be required for a massive expansion of the Burgoyne price survey program (Hicks, Tr. 2337; Benham, Tr. 2901–03).

231. It is found that with respect to comparative food price claims which are represented to be based on, or referring to, a survey, a reasonable basis means a reliable food price survey which is designed and conducted according to sound price survey procedures as recognized by experts who are trained and experienced in the science of survey methodology. The essential characteristics of sound food price survey procedures include all the elements set forth in Part III A of the accompanying Order.

232. It is found that with respect to the advertising claims found to have been made by Kroger in the Summary Decision Order, dated May 17, 1978, Kroger did not possess **[64]**and rely on a reasonable basis therefor. It is further determined that in the circumstances of this case those advertising claims were not only misleading and deceptive but also unfair to the consumer within the meaning of Section 5 of the Federal Trade Commission Act.

V. Certain Practical Difficulties Attending Retail Food Price Surveys—FTC's RFPS Experience

A. *Problems Related to Product Comparability*

233. A fundamental problem in devising a survey to compare prices at competing food retailers is the variation in quality of items sold, especially in the case of fresh meat, produce and private label items (Oliver, Tr. 2576 *in camera;* 2643; RX 1003 *in camera,* p. 45; Gast, Tr. 2209–13; Morgan, Tr. 696–708).

234. "Fresh meat" includes meat items which have neither been frozen nor processed by curing, smoking or other methods. The category includes items such as beef, pork, poultry, lamb, veal, and

fish (Vaughn, Tr. 1886). It does not include processed products such as smoked and canned hams and bacon. Nor does it include frozen or canned meat (Vaughn, Tr. 1889–90).

235. The United States Department of Agriculture ("USDA") has promulgated standards for beef, veal and lamb. Those standards are, in descending order of quality, USDA Prime, USDA Choice, USDA Good, USDA Standard, USDA Commercial, and USDA Canner and Cutter (Vaughn, Tr. 1898). USDA grades are made on the basis of marbling, conformation, age, and finish (Vaughn, Tr. 1902).

236. Less than 60% to 70% of beef slaughtered under federal inspection is graded (Vaughn, Tr. 1951). A large number of supermarket chains sell ungraded beef. These include A&P, The Eagle Division of Lucky Food Stores, and Chatham, a leading food chain in Detroit (Vaughn, Tr. 1901).

237. Kroger and many other chains follow a uniform industry nomenclature for most retail cuts of meat which they sell (Vaughn, Tr. 1911–12). It is not, however, followed by all members of the industry (Vaughn, Tr. 1911–12). Not all stores that purchase graded meat disclose the grade at retail (Kohout, Tr. 1082; Vaughn, Tr. 1910). **[65]**

238. Kroger has a general policy of selling USDA Choice beef (Vaughn, Tr. 1907, 1945). However, it buys only carcasses which would have qualified as "Choice" before the 1976 change; *i.e.,* it refuses to accept carcasses which fall in the low end of the Choice range (Vaughn, Tr. 1906–07). Kroger's purchasing specifications require that carcasses be in a certain weight range, exclude dairy type cattle and contain requirements on fat trim (Vaughn, Tr. 1907–08).

239. Mr. Vaughn stated that he is not familiar with the specifications or practices of other food retail firms for beef and could not say whether any of them may have additional requirements similar to Kroger's (Tr. 1907–08).

240. Variations in quality may arise from cutting methods and trim. For example, the way a Porterhouse or T-Bone steak is cut can affect value significantly. These cuts include a section of meat called the "tail," which consists of rather stringy, tough meat surrounded by a great deal of fat. The "tail" can be trimmed off entirely or up to five inches of the tail can remain (Vaughn, Tr. 1918–19; Morgan, Tr. 696–97).

241. "Trim" refers to fat left on a retail cut of meat (Vaughn, Tr. 1919). Kroger's specifications set a maximum of one-half inch external fat and one inch internal fat for beef; on pork the specifications set a maximum of one-quarter inch external fat

(Vaughn, Tr. 1920). Kroger takes a variety of steps to insure compliance with its trim specifications (Vaughn, Tr. 1920–21). Some other chains have lower trim standards (Vaughn, Tr. 1921).

242. There are USDA quality grades for poultry, consisting of grades A, B, and C (with A being the top grade). These grades reflect the conformation and finish of the fresh bird and whether or not it is damaged (Vaughn, Tr. 1899).

243. Cutting methods on poultry can affect quality. For example, one cutting technique utilized by some of Kroger's competitors substantially lowers the ratio of usable meat to usable bone (Vaughn, Tr. 1917–18).

244. The Department of Commerce has promulgated grades for seafood, but they are not widely used (Vaughn, Tr. 1899).

245. There are no USDA standards for pork (Vaughn, Tr. 1899, 1934). Variations in quality in pork can arise from the age of the animal, as well as the cut and trim (Vaughn, Tr. 1916–17, 1920, 1934–35). **[66]**

246. The phrase "produce" includes all fresh fruit and vegetables sold in the produce department of a grocery store (Bere, Tr. 1965). There are government standards for produce based on characteristics of the products and state of decay. These standards were set up many years ago to enable wholesale buyers and sellers to communicate over the telephone but have no meaning to consumers (Bere, Tr. 1965–69). Information on USDA grades for produce is often unavailable at retail (Bere, Tr. 1972–73, 1988–89, 1991–92).

247. Kroger does not use the government grades for purchasing decisions, but relies instead on the reputation of the grower and the observations of experienced field buyers. Its general policy is to purchase the highest quality produce available (Bere, Tr. 1969, 1982–83, 1994, 2000, 2025, 2055; Morgan, Tr. 705).

248. The confusion inherent in the existing standards arises in large measure from the terminology used. For example, U.S. No. 1 is only the third highest grade for apples, but is the highest grade for peaches and onions; a U.S. Fancy apple is the second to the top grade while a U.S. Fancy potato is the top grade (Bere, Tr. 1967–68).

249. There are 6 USDA grades for apples, 8 to 10 different sizes, and 8 to 10 varieties (*e.g.*, Red Delicious) that appear in the market commonly. Quality distinctions are also drawn on the basis of origin. For example, a Western Red Delicious apple has different characteristics than an Eastern Red Delicious apple and commands a premium in the marketplace (Bere, Tr. 1970–71, 1974). Often the only information about apples available at point of retail sale will be the price (which may be expressed per pound, per apple, or per

dozen), with no information about grade, size, variety, or origin (Bere, Tr. 1972–73).

250. Virtually all lettuce meets the U.S. No. 1 standard, which tells very little except the extent of decay and the presence of three "wrapper" leaves on the head. Lettuce is usually sold by the head. A comparison of the price of two heads of U.S. No. 1 lettuce could involve heads which differ significantly in size, weight and quality (Bere, Tr. 1978–79, 1981, 1983–84).

251. Similar quality differences exist in the case of tomatoes (Bere, Tr. 1986–89), oranges and grapefruit (Bere, Tr. 1989–92), potatoes (Bere, Tr. 1992–96, 2025–26, 2056–57), strawberries (Bere, Tr. 1999–2000), and **[67]**peaches (Bere, Tr. 1999–2001). Nearly all fresh fruits and vegetables in the produce department have quality differences of the sort described above (Bere, Tr. 1999). Even where products of substantially similar character are received by all competitors, *e.g.,* Chiquita bananas, the way in which the produce is handled can affect quality significantly (Bere, Tr. 1984, 2008–09, 2048; Morgan, Tr. 697).

252. The Federal Trade Commission staff recognized the quality comparability problems inherent in a comparison of fresh meat and produce prices (RX 200 *in camera,* pp. 6–7, and 11).

253. [See *In Camera* Findings]

254. The term "private label" may be defined as a line of products which are sold only by a particular company under various house brands. The products are manufactured by the food retailer, procured from outside suppliers, or a combination of both (Gast, Tr. 2175–76, 2178, 2181). Most large food retailing chains carry a private label line of products. Kroger's private label program is as large as or larger than most other food retailers (Gast, Tr. 2178–80).

255. The term "generic products" refers to products sold without brand name, private or national, which simply state, *e.g.,* "Peas," on the label (Gast, Tr. 2181). Kroger does not have a generic program because it views generics as a merchandising gimmick (Gast, Tr. 2181–82). Several of Kroger's competitors carry generic products, including A&P, Weingarten, Liberal, Mad Butcher, Giant Eagle, and Topco Associates (Gast, Tr. 2183).

256. The United States Department of Agriculture has established grades for many food products, *e.g.,* canned vegetables, for which Kroger has private labels. The USDA grades for canned vegetables are, in descending order, "fancy," "extra standard," and "standard." (Gast, Tr. 2200–01). The USDA grades are used primarily to enable retailers to communicate with suppliers concerning quality levels of products (Gast, Tr. 2200–02). The USDA grade is not

required to appear on private label products. The grades have not been used on product labels in part because the USDA nomenclature is not uniform and does not mean much to the consumer (Gast, Tr. 2203).

257. Kroger often carries two different private label brands for products which have varying quality levels. The "Kroger" brand is the top quality and "Avondale" is of lower [68]quality. Kroger buys "fancy" grade vegetables for the "Kroger" label because its policy is to maintain a very high level of quality for its "Kroger" brand (Gast, Tr. 2177, 2184, 2205–06, 2208).

258. Some other retailers may buy "fancy" for their private label line, but others may not. Kroger has no systematic way of determining what grades other retailers purchase. However, Kroger regularly checked private label products on both its Full Book and Burgoyne Price Checks and made judgments about its overall price position based upon these checks (Gast, Tr. 2216, 2208–09, 2223, 2347).

259. There are many products in Kroger's private label line for which there are no USDA grades. Kroger relies solely on its own specifications and quality control program for products without USDA grades (Gast, Tr. 2204–05).

260. For most of the products purchased from outside suppliers for private label programs, it is possible to buy goods varying widely in quality (Gast, Tr. 2184; Morgan, Tr. 708). Kroger has quality specifications which it provides to its suppliers for many private label products. These are designed so that quality will be equivalent to the best-selling "target" national brand (Gast, Tr. 2184, 2192–93, 2195–98, 2206). Kroger has and enforces a quality assurance program designed in part to make certain that private label suppliers are meeting the Kroger specifications (Gast, Tr. 2184–86). It is not clear whether other food retailers have their own specifications for the private label products they purchase from suppliers (Gast, Tr. 2184–85).

261. In a typical metropolitan area in which Kroger operates, there are likely to be at least three or four major competitors. Most, if not all, of the competitors will have a private label program and many will have two or three quality levels for some products. An individual with the experience of working in the private label program at Kroger for several years who went into a store and selected, for example, all the canned peas, private label and national brand, would be unable to make quality determinations from an examination of the labels (Gast, Tr. 2209–11). Price is not necessarily a good indicator of quality differences among private label products of competing food retailers (Gast, Tr. 2211–13).

262. Respondent's witnesses agreed that, in spite of these technical and sometimes significant difficulties **[69]**housewives face in comparing the quality of the products they purchase at food retail stores, housewives typically arrive at a pragmatic judgment regarding the product quality of a food retail store on the basis of their shopping experience over time (Tr. 1926, 2049–50, 2060, 2213, 2223).

B. *Strict Random Sample Methodology Applied to Retail Food Price Survey May Be Difficult and Expensive*

263. Since early 1973 the FTC staff has attempted to devise and recommend to the Commission appropriate methodologies for determining at which food store in a market the "consuming public . . . can satisfy their food needs at the lowest cost. . . ." (RX 200 *in camera,* p. 3). After years of substantial effort, the FTC staff recommendation is pending before the Commission (RX 1003 *in camera,* pp. 1–4; Benham, Tr. 2936–38; Oliver, Tr. 2575 *in camera,* 2649, 2707).

264. In 1972 the FTC staff investigated low-price claims advertised by food retailers, including the claim "Kroger Is The Low Price Leader" made in Dallas (RX 1003 *in camera,* p. 21). In January 1973 the FTC announced publicly a "Proposed Protocol For Federal Trade Commission Retail Food Price Survey" (hereafter "RFPS") (RX 200 *in camera*). The FTC stated that it would conduct its own retail food price surveys in several markets, comparing the price levels among stores in each market. The results of the surveys were to be used in enforcement actions against "significant false advertisers," and also published for the benefit of consumers (RX 200 *in camera,* p. 3). The FTC anticipated that the "first survey will be initiated sometime in 1973." (RX 200 *in camera,* p. 6).

265. From their inception, the FTC surveys were to employ random sample methodology and probabilistic techniques (RX 200 *in camera,* pp. 6–8). Two alternative methodologies were described in the FTC January 1973 announcement, Method A and Method B (RX 200 *in camera,* pp. 6–8). Only Method B was expected to provide "a statistically valid sample of the items likely to be purchased by a typical consumer" and therefore only the market basket totals from Method B would be "indicative of the overall price levels of each store." (RX 200 *in camera,* pp. 11–12).

266. [See *In Camera* Findings] **[70]**

267. [See *In Camera* Findings]

268. [See *In Camera* Findings]

269. [See *In Camera* Findings]

270. [See *In Camera* Findings]

271. [See *In Camera* Findings]

272. [See *In Camera* Findings]

273. [See *In Camera* Findings]

274. [See *In Camera* Findings]

275. [See *In Camera* Findings]

276. [See *In Camera* Findings]

277. [See *In Camera* Findings]

278. [See *In Camera* Findings]

279. [See *In Camera* Findings]

280. The record does not show whether or not any other entity has conducted retail food price surveys to measure price levels at competing retailers by using random sample methodology (RX 992–93, No. 73; RX 1003 *in camera,* pp. 25–26; RX 207 *in camera,* pp. 9–10).

281. One of the theoretical flaws of the RFPS methodology is that a food retailer can improve its standing against competitors in the survey by carrying low quality items at a lower price, whether there were any sales of these items or not (RX 1003 *in camera,* pp. 25–26; RX 207 *in camera* pp. 9–10).

282. Another flaw is that a food retailer could improve its standing against competitors in the survey by carrying very large sizes of items at relatively low average prices per pound, whether or not there are any sales of such items to consumers (Oliver, Tr. 2781).

283. Another flaw is that RFPS results would be affected solely by differing product mixes. For example, a store which carries domestic brands of tea at a low price [71]and a wide variety of more expensive foreign teas would be rated as more expensive than a store which carries only domestic tea at a price higher than the first store (RX 1003 *in camera,* pp. 38–40; RX 207 *in camera,* pp. 51–52).

284. [See *In Camera* Findings]

285. Kroger ran a survey in St. Louis to test the practicability of a random-sample, product type survey of the sort envisioned by both the RFPS methodology and Dr. Kohout's testimony ("St. Louis Survey"). This survey showed that the fears about the effect of product mix on RFPS results were well-founded (Oliver, Tr. 2600–01 *in camera*). In the St. Louis Survey 12 products, analogous to the "products" of the RFPS, were selected (RXs 981–985). The selection of products in the St. Louis Survey was conducted by random sampling, except for the meat product (Oliver, Tr. 2594–2600 *in camera*). Prices for all items constituting each of these 12 products were surveyed at two stores of each of five competitors, including Kroger (RXs 981–985).

286. When average price per pound for a product was computed

for each store in the St. Louis Survey, the relative position of one store of the same chain was different from that of the chain's second store, even though all items common to the two stores were priced the same. These differences occurred solely because of differences in product mix between the two stores of the same chain (Oliver, Tr. 2601–07 *in camera*).

287. The random sample methodology recommended by Dr. Kohout for conducting retail food price surveys is in all essential respects the same as the RFPS methodology (Kohout, Tr. 1053, 1068–70, 1075, 1078, 1169–70, 1178, 1195–96, 1207, 1231, 1237–38, 1270, 1279–80; Oliver, Tr. 2567, 2593–94 *in camera,* 2645; RX 1022 *in camera;* Benham, Tr. 2934). Dr. Kohout reviewed a description of the survey design employed by the RFPS, and agreed it accorded with his description of an appropriate random sample methodology for conducting retail food price surveys (Kohout, Tr. 1068–70, 1244–47; RX 1022 *in camera*).

288. Dr. Kohout testified that the methodological difficulties presented by quality differences in items between stores should be ignored (Kohout, Tr. 1074, 1262; RPF 236 *in camera*). The apparent basis for this position is his assumption that, when reviewing survey results, consumers would "simply assume that we are dealing with **[72]**prices and not with quality." (Kohout, Tr. 1321). Another rationale proposed by Dr. Kohout for ignoring quality was to assume that quality differences in items occur randomly across items and among stores without any correlation with price (Kohout, Tr. 1316–17, 1322–23).

289. According to Dr. Kohout, in a retail food price survey using random sample methodology with a population of products rather than items, a price per ounce would be computed for each store for each product from the surveyed price data for items in each product (Kohout, Tr. 1075, 1197, 1207, 1212–13). According to Dr. Kohout, there are three "equally acceptable" methods for computing price per ounce for each product: (1) using the lowest price per ounce for any item found for a specific product; (2) computing the average price per ounce for all items found for a specific product; and (3) for any product, discarding the item with highest price per ounce, discarding the item with lowest price per ounce, and then computing the average price per ounce for all remaining items found for a specific product (Kohout, Tr. 1204–05, 1213–14).

290. The St. Louis Survey showed that the results of a retail food price survey employing random sample methodology with a population of products rather than items can vary substantially depending on which of Dr. Kohout's three "equally acceptable" methods for

computing price per ounce is employed (Oliver, Tr. 2603–07 *in camera;* 2778–79; RX 985). This methodological problem is inherent in any product-type retail food price survey employing random sample methodology (Oliver, Tr. 2606–07 *in camera*).

291. Dr. Kohout's evaluation of the methodology of various types of retail food price surveys, including the Price Patrol Survey, the Burgoyne survey, the full book check and the RFPS, rests on his conclusion that the "far superior" methodology for conducting retail food price surveys is random sample methodology (Kohout, Tr. 1047, 1054, 1056, 1060–62, 1065, 1075–78, 1083–84, 1091–92, 1109–11, 1149–53, 1281, 1301–08).

292. Dr. Kohout had no knowledge of the Burgoyne survey or full book check methodologies, nor any knowledge of the manner in which Kroger evaluates the results of these surveys (Kohout, Tr. 1295–96).

293. Dr. Kohout was not provided any information about the RFPS experience by complaint counsel, except for the information contained in a description of the RFPS survey design (Kohout, Tr. 1164, 1246; RX 1022 *in camera*). In testifying that a retail food price survey employing the [73]essential aspects of the RFPS methodology would be feasible and inexpensive to accomplish (Kohout, Tr. 1064, 1305–08), Dr. Kohout was therefore unaware of the experience of the FTC with the RFPS.

294. [See *In Camera* Findings]

295. The annual cost of conducting the food component of the Consumer Price Index—a retail food price survey of far less complexity than the RFPS and which does not comply with the methodological standards of Dr. Kohout and the RFPS—on a monthly basis in 56 cities with a six-week turnaround time for computation of results was estimated as $1.8 million by Dr. Benham (Tr. 2900, 2905, 2921, 2942).

296. [See *In Camera* Findings]

297. Since the RFPS methodology results in unique market basket totals for every store in the market, even where a chain has the same price for all items carried in any of its stores in the market, at least several stores of a chain in a market would have to be surveyed as part of an RFPS survey (RPF 247; Oliver, Tr. 2579–80, 2605 *in camera*). Since the ongoing costs of RFPS surveys are directly related to the number of stores included in each survey, the annual cost estimates of conducting RFPS surveys discussed above, which assume only a single store of each chain need be surveyed, are conservative (RX 240 *in camera,* p. 3; RPF 259–262; Oliver, Tr. 2580, 2605 *in camera*).

298. [See *In Camera* Findings]
299. [See *In Camera* Findings]
300. [See *In Camera* Findings]
301. [See *In Camera* Findings]
302. [See *In Camera* Findings]

VI. Economic Effects Of Restraints On Retail Food Price Advertising

303. Advertising which is not deceptive or misleading and which provides consumers with useful information concerning product characteristics and available price alternatives [74]reduces the search time and search costs which consumers otherwise would have to incur to gather that information (Benham, Tr. 2821–22, 2855–57, 3081–84).

304. Dr. Benham, Kroger's expert witness, testified that comparative price advertising can provide consumers with useful information even if that information is not "perfectly accurate" in the sense of being based on surveys conforming to strict theoretical standards of statistical methodology, provided its limitations and "imperfections" are clearly stated in such advertising (Benham, Tr. 2858, 3071, 3080–84).

305. The availability to consumers through truthful or nondeceptive advertising of more price information at less search cost is thought to make the marketplace more competitive and lead to lower prices (Benham, Tr. 2821–22, 2828–29, 2831–32, 2838–39, 2844–45, 2855–57, 2977–80; RX 207 *in camera,* p. 9).

306. According to Dr. Benham, the true total cost of purchasing a product includes both the direct purchase price of the product, and the time and cost of learning about the characteristics and price of the product (Benham, Tr. 2821, 2856–57). Therefore, to the extent the availability of price information through advertising is reduced, the true total purchase costs of goods to consumers are likely to rise because both the prices of the goods and the search costs for obtaining information will increase (Benham, Tr. 2821–22, 2856–57).

307. Increased availability of information through advertising makes it more likely that price-competitive firms will succeed in the marketplace and less likely that higher priced firms will maintain or increase their share of the market (Benham, Tr. 2822, 2829–30, 2846, 2969–71, 2975–76).

308. Increased restraints or costs imposed on price advertising may make it more difficult for highly price-competitive and more efficient firms to convey their pricing posture to consumers, thus

discouraging such firms from entering new markets (Benham, Tr. 2822, 2829–30, 2832–33, 2846, 2866, 2898–99, 2941, 2964, 2969–71, 2973–76).

309. According to Dr. Benham, to the extent that imposition of quality standards on advertising of price information through substantiation and disclosure **[75]**requirements increases costs, it may reduce the amount of such advertising and thus reduce the amount of price information available to consumers (Benham, Tr. 2819, 2824, 2863–64, 2867, 3073–75).

310. The cost estimates for the FTC retail food price survey, the pilot St. Louis Survey conducted by Kroger following Dr. Kohout's proposed methodology, and the government's CPI experience all tend to show that it would cost a large amount of money to set up and run such surveys in the number of cities where Kroger ran the Price Patrol (Benham, Tr. 2900–01).

311. According to Dr. Benham, the costs of a survey meeting the requirements of the definition of "methodological soundness" set forth in RX 1007, part I C, would be exponentially greater than the cost of Price Patrol (Benham, Tr. 2899–2900, 3031–33).

312. Respondent's employees and its expert witness testified that, because of the expense involved, food retail firms would not attempt to conduct retail food price surveys and advertise their results if the surveys were required to comply with a strict definition of methodological soundness such as that set forth in part I C of RX 1007 (Benham, Tr. 2897–99; Thomas, Tr. 2115–16; Stec, Tr. 1778–79).

313. Dr. Benham also testified that the result of requiring any published retail food price survey to meet a strict definition of statistical "methodological soundness" will be to reduce the amount of useful information provided to consumers, which in turn would result in higher prices to consumers in general, a competitive disadvantage for the most price-competitive firms, and a relatively greater adverse cost impact for the least sophisticated consumers (Benham, Tr. 2863–64, 2867, 2898–99, 2969–72).

Discussion

A. *A Reasonable Basis For A Comparative Food Price Claim Purportedly Based On Or Referring To A Price Survey*

The Commission's requirement that an advertiser must possess and rely on a reasonable basis for an affirmative product claim has been judicially sanctioned. *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Firestone Tire & Rubber Co.* 81 F.T.C. 398 (1972), *aff'd,* 481 F.2d 246 (6th Cir. 1973), *cert. denied,* 414 U.S. 1112 (1973); *National Dynamics Corp.*, 82

F.T.C. 488 (1973), *aff'd,* 492 F.2d 1333 (2d Cir. 1974), *cert. denied,* 419 U.S. 993 (1974). **[76]**

The basic rationale of *Pfizer* is that an affirmative product claim carries with it an implied representation that the advertiser possessed and relied on a reasonable basis for the claim when the claim was made and that such an advertising claim in the absence of a reasonable basis is an unfair act or practice in violation of Section 5 within the meaning of Section 5. See *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 234 (1972). The reasonable basis requirement applies even if an advertisement claim is in fact true. 81 F.T.C. at 63. Also see *id.* at 67–68.

In determining what constitutes "a reasonable basis," the Commission set forth a number of guidelines in *Pfizer.* First, the Commission made it clear that the requirement is not solely a "reasonable man" test. The reasonable basis requirement questions both the reasonableness of an advertiser's actions and the adequacy of evidence upon which such action is based. The reasonable basis standard is essentially a fact issue to be determined on a case-by-case basis, and depends on such overlapping considerations as: (1) the type and specificity of the claim made; (2) the type of product; (3) the possible consequences of a false claim; (4) the degree of reliance on the claim by consumers; and (5) the type and accessibility of evidence adequate to form a reasonable basis for the particular claim. For some types of claims and for some types of products, the only reasonable basis "in fairness and in the expectation of the consumers" would be an adequate and well-controlled scientific test. 81 F.T.C. at 64, 66–67.

This proceeding involves comparative food price claims for specific markets which are represented to be *proven* by price surveys. In my view, in the circumstances of this case, such comparative price claims constitute, "in fairness and in the expectation of consumers" and as a matter of law, an implied representation that the advertiser possessed and relied on a reliable food price survey which in fact *proves* those claims. *Cf. Standard Oil Co. of California,* 84 F.T.C. 1401, 1472 (1974), *modified on other grounds,* 577 F.2d 653 (9th Cir. 1978). The record is clear that in order for a food price survey to *prove* a comparative price proposition, the survey must be based on sound price survey procedures as recognized by experts trained and experienced in the science of survey methodology. The record reflects a reasonable agreement among such experts as to the essential elements of a reliable food price survey (F. 139–144, 178–198). And there is little doubt that such a survey can be done although it may be expensive and difficult. **[77]**

B. *Relief*

Respondent's acts and practices found to be in violation of Section 5 of the Federal Trade Commission Act fall into three general groups: (1) express and implied advertising representations that the Price Patrol Survey proved certain comparative price claims in certain cities or metropolitan areas, (2) express and implied advertising representations that the Price Patrol Survey means shopping at Kroger will result in overall savings, and (3) implied representations that Kroger possessed reasonable bases for these comparative price claims. Therefore, *first,* the relief must ban *all* comparative price claims not based on a reasonable basis, regardless of whether a particular claim is purportedly based on a price survey or not. Part II of the Order is designed to accomplish that objective.

Kroger argues that the lack of a reasonable basis was not specifically alleged with respect to lower price claims which are not purportedly based on any price survey and that, therefore, imposition of a reasonable basis requirement for all comparative price claims is overbroad and unreasonable. However, Kroger's advertising claim that the Price Patrol proved Kroger had lower prices or was a low price leader in a city necessarily implied a broad claim of lower prices apart from the Price Patrol Survey. Under these circumstances, the reasonable basis requirement for all types of comparative price claims is clearly and reasonably related to the violation found and is eminently justified. Alternatively, an across-the-board reasonable basis requirement for any comparative food price claim for a city is necessary and appropriate as a "fencing-in" provision in view of the specific violation which was alleged and proved with respect to comparative price claims purportedly based on surveys. *Jay Norris Corp.* v. *FTC,* 598 F.2d 1244 (2d Cir. 1979) (2d Cir. No. 78–4151, decided May 1, 1979).

Secondly, with respect to any comparative price claim for a city which is purportedly based on a price survey, Kroger must possess and rely on a survey which has all the essential characteristics of sound price survey procedures as generally recognized and understood by the community of experts trained and experienced in survey methodology. Otherwise, any express or implied claim that a price survey "proves" or "shows" anything about comparative prices in a given city would be patently misleading, deceptive and unfair. Part III A of the Order is designed to accomplish that objective. The record is clear that a competent and [78]reliable food price survey which meets the conventional technical requirements regarding survey design and execution can be done, although such a survey

may require substantial expenses and encounter certain practical difficulties (F. 139, 233–297). And, there is no cogent reason why Kroger should be allowed to make a comparative food price claim which is represented to be based on a food price survey without in fact having and relying on a competent and reliable survey, which meets these technical requirements. If Kroger is not willing to expend the necessary time and financial resources, it should simply forego comparative price claims represented to be based on, or referring to, a food price survey.

Kroger's argument that such a requirement would exacerbate the inflation in food prices as a result of food retailers' passing on the mandatory survey expenses to the consumer or by inhibiting comparative price advertising by food retailers is unpersuasive. Needless to say, inflation is the most important and urgent domestic issue the Nation faces today and the Federal Trade Commission should not do, in the guise of trade regulation, anything that may compound that problem.[2] However, unless Section 5 of the Federal Trade Commission Act is to be set aside for the duration, a clear statutory violation affecting the consumer in such an important area as food purchases must be stopped, especially where, as here, the affected advertising claim (that a price survey *proves* the advertiser has lower prices in a market) is by no means the only, or the customary, way of comparative food price advertising. The record as a whole does not provide a solid basis for concluding that the requirements set forth in III A will operate to inhibit all or most comparative food price advertising or that a large number of food retail firms will insist on our-survey-proves type advertising and pass on the incremental survey expenses to the consumer. The record does show, however, that Kroger's Price Patrol advertising program was very effective and instrumental in markedly increasing Kroger's market shares (F. 130, *supra*). In these circumstances, Kroger's argument must be rejected as essentially self-serving and unpersuasive. **[79]**

Thirdly, on the other hand, Kroger should be free to make comparative food price claims for any city as long as (1) it does not say that these claims are proved by or based on a price survey and (2) it clearly and fairly discloses the limitations of the comparative claims resulting from any short cut employed in the survey procedure. Part III B (1) and (2) of the Order are designed to

[2] Mr. R. Robert Russell, Deputy Director, Council on Wage and Price Stability, in a letter dated December 1, 1978 and addressed to the Commission Secretary, expressed, without attempting to "judge the merits of this proceeding," the Council's concern that a requirement for more rigorous and extensive survey procedures may inhibit dissemination of price information, discourage price competition and lead to higher food prices. These views were taken into consideration by me.

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accomplish this objective. The record clearly shows that comparative price information enhances competition, provides useful information to the consumer and otherwise inures to the benefit of the consumer (F. 303–308, *supra*). The record also indicates that a technically competent and reliable price survey may be expensive and difficult, fraught with many problems peculiar to the food retail business. In these circumstances, the question whether food retailers should be allowed to make any comparative price claims at all without a competent and reliable price survey is a policy question for the Commission to decide. In my view, common sense would dictate that comparative price advertising of the type under discussion here should be allowed in the absence of a technically competent and reliable survey so long as such advertising alerts consumers to the limitations of the claim. Although this approach is not without certain problems, including some practical and technical problems related to the disclosure requirements,[3] I am persuaded that, on balance, it is a reasonable and realistic way of allowing comparative food price advertising that is not misleading, deceptive or unfair.

Kroger's argument that any disclosure requirement will, as a practical matter, discourage all comparative food price advertising is not persuasive. In any event, a *specific comparative* food price advertising in the absence of *any* price survey would be contrary to the Commission's established policy of requiring reasonable substantiation for advertising claims. The record does not show any reason why the retail food industry should be an exception to that policy. In my view, a reasonable substantiation with respect to specific comparative price claims (not purportedly based on a price survey) in the food retail business means some kind of *bona fide* price survey, accompanied by a fair and straightforward statement of the survey limitations. [80]

Complaint counsel have proposed alternative requirements with respect to comparative price claims not represented to be based on, or referring to, a price survey. They include the use of "market basket surveys" and "number-of-item-surveys." See I and IV of Complaint Counsel's Proposed Order. They appear to be plausible, and may be reasonable and appropriate for the purposes of this case. However, this record does not provide a sufficient basis for an informed and reasoned judgment regarding these alternatives. On the basis of this record, I am unable to evaluate the relative merits and shortcomings of the proposed or other alternatives or assess

[3] For example, I am aware that the disclosure requirements may raise substantial technical problems for radio and television commercials depending on the degree of imperfections present in a particular survey. It may be that the electronic media are not the most ideal media for a broad comparative food price claim of the sort under discussion.

their economic and marketing ramifications with any reasonable degree of confidence. For these reasons, I am unable to accept or endorse complaint counsel's proposed alternatives.

Fourthly, Kroger should not be allowed to make comparative food price claims with regard to a number of items or groups of items (*e.g.,* the Price Patrol advertisements) without stating that such claims do not mean that the consumer will always save by shopping at Kroger, for the simple reason that such a claim necessarily implies a claim that consumers will save overall by shopping at Kroger. Without a straightforward disclaimer statement, the claim will be misleading and deceptive. III B(3) of the Order is designed to accomplish that objective. It is of course arguable that many housewives who view such advertisements will know, or should know, that whether they will save at all, or how much they will save, by shopping at Kroger will depend on what they buy at Kroger. However, *caviat emptor* is inconsistent with the basic purposes of Section 5. Indeed, Section 5 was meant to protect not only the well tutored and intelligent but also the ignorant, the gullible and the credulous. *FTC* v. *Sterling Drug, Inc.,* 317 F.2d 669, 674 (2d Cir. 1963); *FTC* v. *Standard Education Society,* 302 U.S. 112, 116 (1937).

Respondent vigorously argues, on the basis of the testimony of Dr. Benham, its expert witness, and certain corporate employees, that any requirement for disclosure of survey limitations in the same advertisement will, as a practical matter, inhibit all comparative price advertisements to the detriment of competition and consumer interests. However, Dr. Benham also stated that he did not mean to advocate or condone deceptive or untruthful advertising (Tr. 3081–84). And the record clearly shows that comparative price claims not accompanied by appropriate disclosure of limitations are misleading, deceptive and unfair. This fact cannot be ignored or wished away. Comparative price **[81]**advertising is desirable only when it is not misleading, deceptive or unfair.

It should be pointed out here that the Order leaves Kroger free to make any general and non-specific comparative price claim as long as it is not related to a particular city, metropolitan area or a competitor(s). With respect to such general claims, no price survey of any kind, and no disclosure statement, would be required. Whatever a reasonable substantiation may be for such general claims, this record convinces me that such substantiation need not include a price survey. The record also shows that food price surveys are more complex and difficult than meet the eye and that it should not be required lightly of food retailers. In this connection, complaint counsel's proposed disclosure requirement (V B of complaint coun-

sel's Proposed Order) is rejected. Such a requirement is inconsistent with the determination that reasonable substantiation for general claims involved here need not include a price survey. In any event, I am unable to conclude on the basis of this record that such a general claim will be misleading, deceptive or unfair unless accompanied by the proposed disclaimer or that the absence of a price survey in these circumstances is a material fact which must be disclosed.

Kroger's constitutional objections to the reasonable basis requirement are without merit. The reasonable basis requirement with respect to affirmative product claims has been judicially sanctioned. And in appropriate cases, a reasonable basis requires a competent and reliable scientific test. *Firestone Tire & Rubber Co.* v. *FTC,* 481 F.2d 246 (6th Cir. 1973), *cert. denied,* 414 U.S. 1112 (1973); *National Dynamics Corp.* v. *FTC,* 492 F.2d 1333 (2d Cir. 1974), *cert. denied,* 419 U.S. 993 (1974). With respect to comparative food price claims, a reaonsable basis would be a competent and reliable food price survey, or a *bona fide* food price survey accompanied by complete and fair statement of the survey's limitations where short cuts are employed, so as to alert the consumer to any material limitations to the conclusions that can be validly drawn from the survey. *Standard Oil Co. of California,* 84 F.T.C. 1402, 1472 (1974), *modified on other grounds,* 577 F.2d 653 (9th Cir. 1978). *Cf. Bristol-Myers Co.,* 46 F.T.C. 162 (1949), *aff'd,* 185 F.2d 58 (4th Cir. 1950); *Country Tweed, Inc.* v. *FTC,* 185 F.2d 144 (2d Cir. 1964); *General Motors Corp.,* 66 F.T.C. 267, 272 (1964). Kroger has not pointed to, and I am not aware of, any case where a court has held that the First Amendment insulates from prior restraint misleading, deceptive or unfair advertising claims violative of [82]Section 5 of the Federal Trade Commission Act. And comparative price claims involved in this proceeding would be clearly misleading, deceptive and unfair unless the advertiser has a reasonable basis which meets the requirements set forth hereinabove.

Kroger's argument that the Commission's prosecution of this case constitutes an unlawful abuse of discretion is without merit. Although the Commission could have proceeded by way of rulemaking to deal with the matter of comparative food price advertising or awaited the conclusion of the pending Proposed Protocol For Retail Food Price Survey (RFPS), the Commission's discretion to prosecute the instant litigation is well established. *Moog Industries* v. *FTC,* 355 U.S. 411 (1958). This is not a *Marco*[4] situation, where the Commission sought to prohibit practices not shown to be misleading

[4] *Marco Sales Co.* v. *FTC,* 453 F.2d 1 (2d Cir. 1971).

or deceptive and do so without adequate articulation of its reasons when a Trade Regulation Rule adopted contemporaneously by the Commission did not ban similar practices.

Finally, Kroger's argument based on discontinuance is rejected. The record is clear that the Price Patrol advertisements were highly effective and led to marked increases in Kroger's market shares in many markets (F. 130, 135). The record is also clear that the primary reason for discontinuing the Price Patrol program was the pendency of this litigation (F. 107). Under these circumstances, Kroger's discontinuance argument is entirely unpersuasive.

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over respondent's advertising program, known as the Kroger Price Patrol, under Section 5 of the Federal Trade Commission Act.

2. The Complaint herein states a cause of action, and this proceeding is in the public interest.

3. Respondent's use of deceptive and unfair advertising representations has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that said representations are true, and to lead them into the purchase of substantial quantities of respondent's goods by reason of said mistaken belief. [83]

4. The acts and practices of respondent, as found herein, were and are prejudicial and injurious to the public, and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

5. The accompanying Order is necessary and proper for the purpose of prohibiting the continuation of the proscribed acts and practices and is in the public interest.

Order

I.

Definitions

A. *Respondent* means The Kroger Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, acting directly or indirectly through any corporation, subsidiary or other device in the sale of food, household items and other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

B. *Comparative retail food price claim* means any advertising claim which represents, directly or indirectly, that Respondent's retail food stores have lower or lowest prices, or more lower or lowest prices, either overall or with respect to any item, groups of items or product categories.

II.

It is ordered, That Respondent cease and desist from advertising, directly or indirectly, any comparative retail food price claim which refers, directly or indirectly, to a [84]particular city, metropolitan area or a competitor (or competitors), by name or other designation, unless:

A. Respondent possesses and relies on a reasonable basis therefor at the time such claim is made;

B. Any results of the survey or study which are advertised, and any claims based on such surveys or studies, as presented in a manner that fairly and impartially represents those conclusions that may be validly drawn; and

C. The results, data and complete description of the method and procedures used in the price survey, study or check related thereto are made conveniently available to the public for inspection and copying at Respondent's food retail stores.

III.

For the purposes of this Order,

A. With respect to any comparative retail food price claim which refers to, or is represented to be based on, any survey, study or check, a reasonable basis shall mean a retail food price survey which is designed and conducted according to sound survey procedures. "Sound survey procedures" shall include the following characteristics: [85]

(1) Selection of Items.

(a) Surveyed items or products must be selected in such a way as to provide a valid basis for generalizations to be made from the survey results regarding the prices of products customarily sold at a retail food store. Items must be selected from all major product categories to which the survey results are generalized.

(b) If the items are selected by Respondent, they must be selected randomly from the total population or randomly from each major

category of products. Respondent shall not make the list of items available to persons responsible for pricing decisions before the survey is made. Alternatively, the items may be selected by an independent outside firm, either randomly or in such a way as to make the items fairly representative of the total population. If the items are selected by an independent outside firm, the survey item list shall not be disclosed to any firm to be surveyed before the survey is conducted. Regardless of whether items are selected by Respondent or by an independent outside firm, the survey item lists must be periodically rotated. **[86]**

(2) Comparability of Survey Items.

Items which are compared must be identical or substantially similar. Branded items which are the lowest priced items available in a product category are substantially similar. Meats identical in cut and grade are substantially similar. Produce items of the same type and geographic origin are substantially similar. If an identical or substantially similar item is unavailable at a particular store, the item must be excluded from the survey for all stores and shown as unavailable for comparison.

(3) Stores Surveyed.

Only one store of each firm need be surveyed in a single survey period in a single city or metropolitan area. If a firm has price zones among its stores in the same city or metropolitan area, the store of that firm should be periodically rotated among price zones.

(4) Competitors Surveyed.

Competitors to be surveyed must be selected in such a way as to provide a valid basis for any generalization to be made from the survey results. **[87]**

(5) Reasonable efforts must be made to avoid conducting surveys under circumstances which may introduce systematic error in survey results.

B. With respect to any comparative retail food price claim, made directly or indirectly, which refers, directly or indirectly, to a particular city, metropolitan area or competitor(s) and which does not refer to or is represented to be based on any survey, a reasonable basis shall mean:

(1) A price survey which is designed and conducted according to sound survey procedures as set forth in III A (1) through A (5) hereinabove, or

(2) A price survey which does not meet one or more requirements

set forth in III A (1) through A (5) hereinabove, *provided, however,* complete and fair disclosure of the limitations due to any failure to meet such requirements is made in the same advertisement. For example, if the survey excluded any major product category, such as meat, the advertisement must contain the following disclosure:

THE SURVEY ON WHICH THIS ADVERTISEMENT IS BASED DID NOT INCLUDE MEAT [CATEGORY(IES)].

(3) With respect to a comparative food price claim for a group of items which, directly or [88]indirectly, purports to show which competitor offers more lower prices, the advertisement must contain the following disclosure:

WHETHER YOU WILL SAVE OR HOW MUCH YOU WILL SAVE WILL DEPEND ON WHAT YOU BUY.

IV.

Disclosures required in this Order shall be featured prominently (A) in all printed advertisements and shall be printed in at least sixteen (16) point, bold-face capitals, (B) in the audio portion of any radio advertisement and no other sounds, including music, shall occur at the same time, and (C) in the visual portion of any television advertisement throughout the length of the commercial.

V.

It is further ordered, That Respondent shall, within sixty (60) days after service of this Order upon it, file with the Commission a written report setting forth in detail the manner and form in which it has complied, or intends to comply, with this Order.

VI.

It is further ordered, That Respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the [89]corporation which may affect compliance obligations arising out of this Order.

VII.

It is further ordered, That the allegations contained in Paragraphs

Six D and Seven D of the Complaint be, and they hereby are, dismissed.

Opinion of the Commission

By Clanton, *Commissioner:*

The Kroger Company, a retail food chain, is charged with engaging in unfair and deceptive practices as a result of its alleged failure to substantiate certain claims made in a comparative price advertising campaign known as the Kroger Price Patrol. During this campaign, Kroger organized small teams of shoppers into Price Patrols, which conducted weekly surveys of the prices charged for specific products by Kroger stores and their local competitors. The company advertised the survey results, which in the vast majority of occasions showed Kroger with lower prices on substantially more items than its rivals.

On complaint counsel's motion for summary judgment, the administrative law judge ("ALJ") found that the advertisements had represented, inter alia, that the Price Patrol surveys were methodologically sound and that they proved both that most items in Kroger stores were cheaper than in competitors' stores and that consumers would save overall by shopping at Kroger. Evidentiary hearings were then held with respect to the remaining issues, such as the adequacy of respondent's substantiation, the adequacy of its disclosure of material facts, and the nature of appropriate relief in the event respondent was found to have violated the FTC Act. [2]In his Initial Decision, issued on June 11, 1979,[1] the ALJ determined that the respondent's substantiation for its Price Patrol claims was deficient. He concluded the company had violated Section 5 of the Federal Trade Commission Act and ordered it to desist from further comparative food price advertising unless it followed specified survey procedures and made disclosures qualifying its claims.

[1] The Initial Decision and other materials in the record of this case will be cited to with the following abbreviations:

ID	–	Initial Decision, Finding No.
ID p.	–	Initial Decision, Page No.
CX	–	Complaint Counsel Exhibit No.
RX	–	Respondents' Exhibit No.
Tr.	–	Transcript of Testimony, Page No.
RAB	–	Respondents' Appeal Brief, Page No.
CAB	–	Complaint Counsel's Answering Brief, Page No.
RRB	–	Respondents' Reply Brief, Page No.
CPF	–	Complaint Counsel's Proposed Finding, Page No.
RPF	–	Respondents' Proposed Finding, Page No.
TROA	–	Transcript of Oral Argument, Page No.

Kroger has appealed, attacking the proceedings below on a variety of fronts. It argues first that the ALJ's interpretation of the advertising claims was incorrect and that his decision to interpret the advertisements on a motion for summary judgment was erroneous. Second, Kroger contends that even if its advertisements made the representations found by the ALJ, they were reasonably substantiated by the Price Patrol surveys themselves and by other, Kroger-sponsored comparative price checks. Third, the respondent objects to the ALJ's order, asserting that its stringent survey and disclosure requirements will only discourage Kroger and its competitors from running any future comparative food price advertisements, thus depriving consumers of useful information and weakening competitive pressures to reduce food prices. Finally, Kroger raises several evidentiary issues and argues that ALJ Hyun should have been disqualified from trying this case.

These contentions will be addressed in turn, following an outline of Kroger's pricing policies and its Price Patrol advertising campaign.

Background

Kroger is one of the largest retail food companies in the nation. At the time this case was tried, Kroger was doing business in twenty states, operating 1170 stores which it had grouped for organizational purposes into thirteen Kroger Marketing Areas ("KMA"). [3]

Prior to 1972, Kroger's prices on most shelf goods were relatively high, although it featured certain highly discounted, or "deep cut," products in its advertising to attract customers. (Tr. 2315.) In May 1972, however, the company decided to switch to what it calls its Everyday Low Price policy ("EDLP"), under which all groceries and merchandise were to be sold at reduced prices. The objective of the Everyday Low Price policy was to ensure that a person who shopped at Kroger would, over time, realize savings that matched or surpassed those offered by comparable stores. (Tr. 2313–15.)

Thus, Kroger's Grocery Merchandisers, who price the goods to be sold in their respective KMAs were instructed to reduce shelf prices to those charged by the lowest merchant in town that offered the same services. (CX 15 p.2.) The Everyday Low Price policy relied heavily on merchandisers' use of rollers—these are typically high-volume, well-known products, other than meat or produce, on which manufacturers' or distributors' allowances are given. Kroger stores passed along part of the discounts on these rollers to consumers in the form of lower prices; the remainder was retained, so that rollers,

despite their low price, were among the most profitable items sold on Kroger shelves.[2]

To publicize its Everday Low Price policy, Kroger initiated the Price Patrol advertising campaign in the Atlanta KMA late in 1972. (RX 900 p.3.) It spread to six other KMAs and, at its peak, covered 100 cities in fourteen states. (ID 104–105.) Each KMA ran the campaign according to instructions contained in manuals distributed by Kroger's general office. (*See* CX 15–16.) Kroger employees responsible for implementing these guidelines in their respective KMAs initiated the program by setting up teams of local housewives, who were instructed to make weekly comparisons of the prices charged on selected products by Kroger and its major competitors. [4]

The products covered by the survey were selected by the Grocery Merchandisers in participating KMAs. They would pick approximately 600 items, which the KMA Advertising Manager would then group into four lists of 150 products or so each. (ID 71.) These lists were given on a rotating basis to Price Patrollers each week over the course of a three-month period, at which point the master list would be reviewed by Grocery Merchandisers for necessary changes.[3]

In their product selections, Grocery Merchandisers concentrated on items that were purchased frequently, were well-recognized by consumers, and were likely to be stocked by competitors. Also, Kroger officials testified that selections were made from among all types of "groceries" in the store, in order to ensure that survey samples represented all product categories. (*E.g.*, Tr. 1574–75.) This procedure was subject to some important limitations, however. First, in Kroger's parlance, the term "groceries" does not cover fresh meat, produce, or delicatessen (including fresh baked) items; these items were, in fact, systematically excluded from the surveys because Kroger perceived quality variations between such products sold in its stores and those sold by competitors. (Tr. 2101, 1574–75.)[4] Second, private label or house brand items, though within Kroger's defini-

[2] CX 15, a Price Patrol manual written in Kroger's headquarters and distributed to KMAs, contains examples of how the roller system works. The following table taken from page 4 of the manual, illustrates the effect of a roller on the price and profitability of a 50 foot roll of aluminum foil. Figures in parentheses are evidently unit costs.

Regular Cost $12.82 (.256) "Roller " Cost $ 9.82 (.196) Regular Retail $15.00 (.300) "Roller" Retail $13.50 (.270) Normal Pennies Profit $2.18 (.044) "Roller" $3.68 (.074) Regular Mark-up % 14 ½% "Roller" Mark-up % 27% Experience has shown sales on the above item almost doubled in a 4 week period giving an additional $500 mark-up.

[3] On the average, changes to the lists were made twice a year. Reasons for modifications included the introduction of new products into the market and changes in the popularity or availability of items. (Tr. 2127–28.)

[4] At one point, Kroger apparently intended to offer evidence that some Price Patrols included some meat items and produce. *Order Ruling on Complaint Counsel's Motion for Summary Decision*, at 16 (May 17, 1978). However, the ALJ ultimately found that fresh meat and produce, as well as delicatessen items, were not chosen for the Price Patrol survey lists. (ID 93.) In its appeal, Kroger has not disputed this finding. (See RAB 4).

tion of groceries, were generally excluded from survey samples, again because of quality variations between Kroger and its competitors; milk and dairy products, which Kroger considered to be of equivalent quality in all stores, were included, however, along with a few other private label items.

To avoid biasing results, Kroger did not tell Price Patrollers which of its stores or its competitors' stores should be checked or on which day of the week the surveys should be run. (JX 2, Stec deposition p. 79.) Furthermore, all Price Patrol results were checked for accuracy by Kroger's advertising department. Items on which errors had been made to Kroger's advantage were eliminated from the survey; those on which errors favored a competitor were retained. (ID 86.)

After reviewing the Price Patrollers' checklists, the KMA advertising departments prepared "recap" sheets, which summarized the weekly survey results: Kroger's prices were compared with those of each competitor, and a table was [5]compiled showing the numbers of items on which Kroger was lower than, equal to, and higher than each other retailer in the survey. (RX 902; JX 2, Stec deposition at 90–91.) These tables or box scores were featured in weekly television or newspaper advertisements. Typically, the advertisements showed that Kroger had more lower-priced items than each of its competitors. However, on the rare occasion that Kroger "lost" a Price Patrol check, its advertising would so state. The grocery merchandising department would then conduct a survey of its own to determine whether price adjustments were needed to assure that Kroger's prices were as low as the competition's. (ID 90.)

A number of the television advertisements mentioned that the weekly surveys compared "popular brand name items." (*See, e.g.,* RX 537 pp. 1–8.) Some commercials also specified that comparisons were limited to national or regional brands and that Price Patrollers "never compare store brands against national or regional brands" because this "wouldn't allow fair comparison." (RX 599.) However, none of the television commercials explicitly disclosed that meat and produce had been systematically excluded from Price Patrol surveys. Similarly, the newspaper advertisements failed to disclose the exclusion of meat and produce until 1976, when announcements of survey limitations began appearing in relatively small print near the Price Patrol claims. (ID 116; RX 595.)

The television commercials and some of the newspaper advertisements did invite consumers to inspect the Price Patrollers' checklists, which were regularly posted in Kroger markets. These checklists showed which items had been surveyed and what prices had been charged. The record indicates that a significant number of

consumers consulted them; one Kroger study found that between 8% and 30% of food shoppers who associated the Price Patrol campaign with Kroger had referred to the checklists in the stores. (CX 708 p.3.)

Kroger KMAs increased their advertising budgets to mount the Price Patrol campaign and placed their emphasis on television commercials, although Price Patrol results were also announced in large newspaper advertisements.[5] The campaign was run in some KMAs for nearly six years, compared to a lifespan of three or four months for most of Kroger's other advertising programs. (Tr. 2093–I.) The evidence suggests that the campaign effectively informed consumers of Kroger's Everyday Low Price policy. [6]Consumer research showed high levels of public awareness and credibility in areas where the Price Patrol had been run. (CX 708.) Furthermore, Kroger sales, profits, and market share increased significantly during the Price Patrol campaign. In Atlanta, for example, Kroger's market share doubled. (Tr. 1870, 2159.)

The Price Patrol program was terminated in all cities by May 1978. Kroger states that its decision to end the program was prompted primarily by the fact that the present case had been brought. (Tr. 2130, 2160.)

Kroger ran two other comparative price survey programs during the time the Price Patrol was in effect. Both were designed specifically to enable the company to assess its price competitiveness, and their results were never advertised. The first survey, referred to as the Full Book Check, was conducted by Kroger employees at least once a quarter and in some areas as often as every six weeks. The check covered the prices of 2,000 to 4,000 items, sometimes including meat and produce. Results were tabulated in terms of the number of items on which Kroger was higher than, equal to, or lower than particular competing stores. (Tr. 2342–47.) The second of these surveys was known as the Burgoyne check, after the name of the firm that conducted it for Kroger. This was a market-basket survey—a survey of items selected to represent the types of purchases a typical consumer might be expected to make. The products surveyed regularly included meat and produce, as well as grocery items. Kroger employees selected the survey items and attempted to ensure that their choices would produce a sample that reflected the proportions of a consumer's food bill attributable to

[5] One KMA, evidently typical of others, spent sixty percent of its advertising funds on television time and twenty percent for newspaper space. (Tr. 1712) Only fifteen percent of the newspaper advertising space concerned Price Patrol results—the rest was given to promoting specific grocery, meat, or produce items. Kroger therefore asserts that only 5% of the advertising funds devoted to Price Patrol went to newspaper ads, while 95% of this budget was used for television commercials. (RAB at 22, fn. 33.) However, it should be noted that in the majority of newspaper advertising, the space set aside for the Price Patrol was highly visible; for example, the Price Patrol surveys were usually referred to in the advertisements' headlines.

meat, produce, and grocery items. Like the Full Book Check, the Burgoyne check was conducted on a quarterly basis. (Tr. 2321–30.)

Discussion

A. Summary Judgment on Meaning of Advertisements

On May 17, 1978, the ALJ issued an order ruling on a motion by complaint counsel for summary judgment. The law judge denied part of the motion but agreed with movant's assertions that the Price Patrol advertisements had made the following claims:

1. The results of the Price Patrol Survey prove that most items in respondent's stores are priced lower than in competitor's stores.
2. The results of the Price Patrol Survey prove that shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures. [7]
3. Shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures.
4. The Price Patrol Survey is a methodologically sound survey.[6]

Kroger opposed the summary judgment motion, and it reiterates on appeal two of the arguments it presented below. First, it argues that summary judgment may not be granted to resolve wholly factual issues such as the meaning of its advertisements, but is appropriate only for resolving legal questions where no factual issues are in dispute. Second, the company asserts that complaint counsel have failed to carry their burden of proof because they introduced no extrinsic evidence to support their reading of the Price Patrol campaign. These arguments were rejected by the ALJ on the authority of *Ford Motor Company,* 87 F.T.C. 756, 794–97 (1976). Thus, Kroger now raises a third argument: that the ALJ misread *Ford,* which respondent says was not intended to authorize a law judge to ignore federal judicial precedent on summary judgment procedures.

We agree with respondent's interpretation of *Ford.* We have previously applied our summary decision rule, Rule 3.24, consistently with case law construing the equivalent provision of federal civil procedure, Rule 56. *Lehigh Portland Cement Company,* 78 F.T.C. 1556, 1557 (1971); *The Hearst Corporation,* 80 F.T.C. 1011, 1014 (1972). The *Ford* opinion signals no departure from this policy. The decision does establish that summary judgment motions may be granted in advertising cases. However, it provides little guidance as

[6] See ID 109–112, which restate the ALJ's conclusion that the advertisements made these claims.

to when summary decisions concerning advertisement claims should be issued and the burden of proof imposed on movants.[7] These issues must be decided, as Kroger asserts, on the basis of accepted principles of summary judgment procedure. [8]

As to its first argument concerning the propriety of a summary decision on the meanings of advertisements, Kroger is clearly right that a motion for summary decision is an inappropriate vehicle for resolving genuine factual controversies. Just as clearly, however, such a motion may properly test the genuineness of asserted factual issues, and the ALJ may issue an order "specifying the facts that appear without substantial controversy." Rule 3.24(a)(5). Kroger's real argument in this regard, however, seems to be that an order of the sort described in subsection (a)(5) may be sought only if the judge has denied a motion on all or some of the ultimate claims in a case.

There is certainly precedent for the denial of summary decision motions whose only goal is to adjudicate questions of fact that do not dispose of any claim. *See Yale Transport Corp.* v. *Yellow Truck Coach Mfg. Co.*, 3 F.R.D. 440 (S.D.N.Y. 1944); 6 *Moore's Federal Practice* ¶56.20[2.–2]. However, in federal practice, facts that are not seriously disputed may be disposed of at a pretrial conference under Rule 16. Professor Moore indicates that it is preferable to resolve such matters under Rule 16, which leaves the decision to schedule a pretrial conference to the court's discretion, rather than under Rule 56, which requires a judge to specify the facts that are not disputed. Moore also notes, however, that distinctions between these rules have faded in districts where cases are pretried as a matter of course, and observes that the *Yale Transport* court went on to dispense with the factual issues before it under Rule 16. 6 *Moore's Federal Practice* ¶56.20 [3–2] at 1216.

We believe that Kroger's objection to the procedure followed by the ALJ here lacks substance. Commission Rule 3.21 provides for the simplification and clarification of issues in pretrial conferences and makes at least one such conference mandatory in every case. Rules 3.21 and 3.24 both equip ALJs adequately to dispose of factual issues before a hearing if they are not genuinely disputed. Kroger was not injured in the least by the ALJ's decision to grant, in part, complaint counsel's motion under Rule 3.24, rather than to require them to resubmit under Rule 3.21. *See Yale Transport Corp.*, 3 F.R.D. at 441

[7] In *Ford*, the parties moved for summary judgment on all issues in the case; here, the ALJ's summary decision concerns only factual matters, a distinction that Kroger contends is critical. Furthermore, the question faced in *Ford* was whether a summary judgment motion on advertisements should be granted when the party opposing it had offered to submit consumer surveys that it claimed disputed the existence of the claims alleged by movants. Here, Kroger has not offered any extrinsic evidence of its own on the proper interpretation of its advertisements. The company charges that it had no need to do so given the impropriety of the decision and complaint counsel's failure to carry its own burden of proof.

(after concluding that motion could not be properly brought under Rule 56(d), court decided to permit it under Rule 16).[8] Accordingly, we [9]hold that the ALJ's decision to expedite proceedings by disposing of uncontroverted facts prior to trial was not improper.[9]

Respondent's second argument is that complaint counsel have failed to carry their burden of proof. The law is clear that, on a motion for summary judgment, the court must draw all factual inferences against the movant, and may rule in the movant's favor only if persuaded beyond doubt that no genuine issues of material fact exist. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970); 6 *Moore's Federal Practice*, ¶56.15[3] at 466–67.[10] Kroger asserts that the claims alleged by complaint counsel are not within the literal meaning of the Price Patrol advertisements, and that complaint counsel have not even attempted to support their interpretations with extrinsic evidence. According to Kroger, the existence of the purported claims thus remains a matter of factual inference, and that Kroger is entitled to have that inference drawn in its favor because it has opposed the summary decision motion.

It is settled that the Commission has sufficient expertise to determine an advertisement's meanings—express and implied—without necessarily resorting to evidence of consumer perceptions. *National Dynamics Corp.*, 82 F.T.C. 488, 548 (1972), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974). This is not to say that an advertisement is susceptible to every reading that it may technically support, no matter how tenuous it might be; rather, the interpretation must be reasonable in light of the claims made in the advertisement, taken as a whole. *National Dynamics Corp., supra; Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 455, 457 (1971), *aff'd*, 481 F.2d 246 (2d Cir. 1973). In many cases, the Commission has refused to accept particular interpretations urged by complaint counsel because the advertisements themselves did not imply them and no extrinsic evidence had been offered to prove their apprehension by [10]some reasonably significant number of consumers. *E.g.*,

[8] Procedurally, both a pretrial ruling under Rule 3.21 and a partial summary adjudication under Rule 3.24(a)(5) are interlocutory in nature. Thus, regardless of which procedure is followed, a litigant would have the same right to seek interlocutory Commission review of the ALJ's determination. See Rule 3.23(b).

[9] We note that complaint counsel's motion did in fact seek a summary determination that the advertisement's failure to disclose the exclusion of meat and produce from the Price Patrol surveys constituted a violation of Section 5 of our Act. The law judge denied this portion of the motion because Kroger proffered evidence that some meat items, produce, and house brands were included in certain surveys. *Order Ruling on Complaint Counsel's Motion for Summary Decision*, at 16 (May 17, 1978).

[10] The traditional test applied by the courts has been that the movant must establish beyond the "slightest" doubt that no genuine factual issue exists. Some circuits now require only that the movant show there is no "real and substantial" doubt concerning the absence of genuine issues. *See* 6 *Moore's Federal Practice*, ¶56.15[3] n.6 at 467–69 & Supp. Insofar as this case is concerned, we believe that the same results should be reached under either test. We find it unnecessary, therefore, to choose between the standards of "slightest" doubt and "real and substantial" doubt.

Pfizer, Inc., 81 F.T.C. 23, 59 (1972); *Sears, Roebuck and Co.*, 95 F.T.C. 406, 510–11 (1980).[11]

Nevertheless, we do not agree with Kroger's apparent argument that an implied claim can never be determined on a summary decision motion absent the support of extrinsic evidence. Applying accepted principles of summary judgment law to the case at hand, it seems to us that the critical issue is not whether the alleged claims are implicit, but simply whether they are so clearly conveyed by an advertisement that no genuine issue as to their existence can be raised. Where such certainty exists, the movant may be said to have fully discharged its burden of proof under Rule 3.24.[12] [11]

We now turn to the particular claims found by the law judge to determine whether they were stated or implied by the advertisements clearly enough to justify a summary adjudication.

1. The claim that most items in Kroger stores are priced lower.

The respondent contends that its advertisements stated merely that Kroger had more items with lower prices than its competitors, not that most items in its stores were cheaper than those sold by competitors. Our review of the advertisements in the record bears out Kroger's assertions. The newspaper advertisements cited in

[11] When extrinsic evidence on the meaning of an advertisement has been introduced, it must, of course, be considered by the law judge and the Commission. See *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 588 (D.C. Cir. 1970). Such evidence does not wholly supplant Commission expertise, however, but simply contributes to the Commission's ability to form a comprehensive understanding of the advertisement. *Firestone Tire and Rubber Co., supra*, 81 F.T.C. at 454; *Crown Central Petroleum Corp.*, 84 F.T.C. 1493, 1540 (1974). An advertisement may convey a variety of meanings, depending not only on the complexity of its text and method of presentation, but also on the variation in backgrounds and interests of its audience. See *Continental Wax Corp.* v. *FTC*, 330 F.2d 475 (2d Cir. 1964); *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270 (2d Cir. 1962). Thus, consumer survey evidence suggesting the predominance of specific claims does not necessarily indicate the nonexistence of other implied representations. Of course, the challenged claim must be a reasonable interpretation of the advertisement, but it is settled that an advertisement capable of several reasonable interpretations may violate Section 5 if but one of them is deceptive or unfair. *Chrysler Corp.* v. *FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Resort Car Rental System, Inc.* v. *FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *Continental Wax* v. *FTC, supra; Murray Space Shoe Corp.* v. *FTC, supra.*

[12] Once a movant has made a satisfactory *prima facie* showing of the absence of genuine factual issues, the opposing party bears the onus of resurrecting the possibility of a dispute concerning material facts, which it may do by filing affidavits that set forth appropriate facts or that explain its present inability to state the facts justifying opposition to the motion. Rule 3.24(a)(4). See also *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970); 6 *Moore's Federal Practice* ¶56.15[3] at 483–87. The opponent is not entitled to hold back evidence it would have relied on at trial, nor may it forestall summary judgment by asserting immaterial facts or setting forth merely speculative arguments. See 6 *Moore's Federal Practice* ¶56.15[3] at 485–87, and cases cited therein.

Here Kroger states that it "offered no evidence on the meaning of the commercials" in opposition to complaint counsel's motion, but argued primarily that complaint counsel had failed to demonstrate the absence of a triable issue. (RRB at 24, fn. 26.) As to those claims for which complaint counsel have met their burden of proof, Kroger cannot now complain that it was denied the right to present extrinsic evidence on the proper interpretation of its advertisements or that the law judge may not apply his expertise "in a vacuum." (See RRB at 26.) If Kroger had facts suggesting that complaint counsel's reading of the Price Patrol commercials was wrong, those facts should have been presented in opposition to the summary judgment motion.

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complaint counsel's motion carried such headlines as "Kroger Shoppers Save More—The Price Patrol Proves It."[13] and "Price Patrol Proof—Kroger Leads with Low Prices in Atlanta!"[14] The advertisements' copy often stated:

"Kroger is dedicated to the principle of pricing products so that we will be lower on more items more often than anyone else." We have lived up to that pledge as proven by the Price Patrol.[15]

Kroger is lower on more items than any competitor the Price Patrol checked. . . .[16]

Statements in the television commercials are to the same effect. These are undeniably forceful claims, ones that clearly promise that shoppers will save money by patronizing Kroger stores. But we do not think that the advertisements either state or imply that *most* items in Kroger stores are cheaper than in competitors' supermarkets. Nothing in the newspaper advertisement headlines or in the text of print or television advertisements makes such suggestions. Moreover, while the [12]box scores used to publicize Price Patrol results usually showed that Kroger had more lower priced items than each of its competitors, they also usually showed that the number of such items was less than the total of items on which Kroger's prices were equal to or higher than those of its competitors. Thus, we conclude that there is a genuine factual issue about whether a "most items" claim was communicated by these advertisements. It was therefore improper to issue a summary decision holding that the claim was made, and we reverse the ALJ's determination on this point.[17]

2. The claim that Price Patrol surveys prove that shoppers save overall at Kroger and that surveys are methodologically sound.

The advertisements in the record are quite sufficient to demonstrate that Kroger claimed its Price Patrol results proved that shoppers would save by patronizing Kroger stores.[18] As the quotes in the preceding paragraphs demonstrate, Kroger's newspaper adver-

[13] Complaint counsel's First Request for Admissions, Attachment 3(k).

[14] *Id.*, Attachment 3(d); see also RX 551–556. (RXs 552 and 555 appear in Appendix.)

[15] *Id.*, Attachments 3(d) and (g); see also RX 540. (RX 540 appears in Appendix.)

[16] *Id.*, Attachments 1(i), (r), (u).

[17] It would, of course be appropriate to remand this issue to the ALJ for receipt of further evidence. However, as we discuss below, other evidence in the record independently justifies forbidding respondent from unfairly or inaccurately advertising the results of comparative food price surveys. Consequently, it is unnecessary to determine whether Kroger's advertisements actually made the "most items" claim and, if so, whether that claim was substantiated. See *Sears Roebuck and Co.*, 95 F.T.C. 406, 512 (1980), *petition for review filed*, No. 80–7368, 9th Cir., July 17, 1980.

[18] *A fortiori*, we find that Kroger also made the basic claim that consumers would save overall by shopping at its stores.

tisements could hardly have been clearer in representing that the Price Patrol "proved" shoppers save more at Kroger.

The newspaper advertisements are sufficient in themselves to establish that the "proof of overall savings" claim was made. However, we find that Kroger's television commercials, though more muted in tone, also represented the Price Patrol results as proof that one would save money by shopping at Kroger. A script from one of the commercials, introduced by respondent and found to be typical by the ALJ, should illustrate the point. It reads in part as follows:

> 1. The best way to find out who really has the low prices in the Atlanta area is to check the _____ leading food retailers each week.
> 2. That's what the Kroger Price Patrol does.
> 3. We checked prices on 150 popular name brand items, and found Kroger lower on this many items . . . higher on this many items . . . and the same on this many items . . .
> 4. Once again, Kroger was lower on more grocery items than any other store we checked. [13]
> 5. Read our complete report at Kroger. See why we believe Kroger is doing what it takes to stay the Atlanta low price leader. (RX 537, p.2.)

Unlike the newspaper advertisements, this script does not contain the words "proof" and "savings." However, they are conveyed emphatically enough by the advertisement as a whole. The attention given in the script to Kroger's low prices conveys to consumers a message that they can save by shopping at Kroger; the viewing audience is doubtless interested in Kroger's pricing policy chiefly because the information may help them stretch their dollar further. The overall savings claim, then, is quite clear.

It is also clear that the television commercials used the Price Patrol surveys to demonstrate reliably that shoppers would save overall at Kroger stores. The advertisements attempted to back up the overall savings claim by featuring the Price Patrol survey data and by advising viewers that these surveys were "the best way to find out who really has the low prices. . . ." The Price Patrol surveys were obviously presented not merely to show that Kroger was lower than its competitors on the items checked, but also to demonstrate that Kroger would be cheaper overall. The commercials invite consumers to assume that the Price Patrol data can be projected reliably to all types of items sold by Kroger. Consequently we conclude that the television commercials imply strongly what is explicitly stated in the newspaper advertisements—that the Price Patrol proves shoppers would save overall by patronizing Kroger.

We also conclude that both the television and the newspaper advertisements represented the Price Patrols as being methodologi-

cally sound. The representation was implicit in Kroger's claim that the surveys were proof of Kroger's lower prices. Inherent in the proof claim is the notion that the surveys were conducted in such a way that their results are reliable enough to prove the overall savings representation. This is simply a definition of methodological soundness. Thus, because Kroger did claim its surveys had provided proof, it also implied that they were methodologically sound.

Our approach in interpreting Kroger's television commercials has not been to focus only on what words are spoken; rather, it has been to follow our established policy of identifying the advertisement's general impressions. *Standard Oil Company of California,* 84 F.T.C. 1401, 1472 (1974), *modified on other grounds,* 577 F.2d 653 (9th Cir. 1978); *Rhodes Pharmacal Co.* v. *F.T.C.,* 208 F.2d 382, 387 (7th Cir. 1953). Kroger argues, [14]however, that any claims of "proof" or "methodological soundness" are belied by the overall "folksiness" of its television advertisements, and seeks to draw a parallel with *Pfizer, Inc.,* 81 F.T.C. 23, 56 (1971), in which the frivolous nature and "aura of sexiness" in a challenged ad apparently convinced the Commission that Pfizer had not impliedly represented that it had scientific tests to substantiate its performance claims.

The folksiness cited by Kroger is undeniably present in its commercials—Price Patrollers introduce themselves by their first names and informally begin some of their commercials by explaining that a colleague's absence is due to the fact that she just had a child or that her husband was transferred to another city. Still, we do not find that these characteristics detract from the significance or perceived reliability of the survey results. Furthermore, Kroger's commercials are quite distinct from the advertisement litigated in *Pfizer.* The Pfizer advertisement concerned a sunburn ointment which, according to the blond (female) television model, actually anesthetizes nerves and stops sunburn pain in "less time than it takes me to slip out of my bikini." 87 F.T.C. at 59. Nowhere in the commercial did the advertiser suggest it had conducted any tests to support these claims. *See Id.* at 58 n.4. Here, the situation is wholly different since Kroger built its entire advertising campaign around the surveys conducted by its Price Patrols.[19]

[19] Kroger has also argued that, given the nonscientific nature of its commercials, the Price Patrol surveys could have been viewed as providing only the kind of proof on which "housewives would rely or on which business people would rely in making decisions." (RAB p.24.) There is certainly nothing to this effect suggested by the advertisements themselves. Moreover, Kroger has failed throughout these proceedings to suggest what specialized kinds of proof it believes that housewives and executives customarily rely on. We are satisfied that a common sense interpretation of the Price Patrol campaign supports complaint counsel's position that the surveys were represented as providing "proof"—as that term is generally understood—that shopping at Kroger will result in savings. It was incumbent on Kroger to proffer evidence suggesting that this reading of the advertisements was incorrect. See note 12 *supra.* Kroger chose not to do so, however.

Both the television and newspaper advertisements leave us with little doubt that Kroger has presented its Price Patrol surveys as methodologically sound and as proof that consumers will save at Kroger stores. Accordingly, we affirm the ALJ's decision regarding these claims. **[15]**

B. Adequacy of Substantiation

It is now well-settled that Section 5 of the Federal Trade Commission Act prohibits advertisers from making affirmative product claims that they have no reasonable basis to believe are true. *Pfizer, Inc., supra; Firestone Tire and Rubber Co., supra; National Dynamics Corp., supra; National Commission on Egg Nutrition,* 88 F.T.C. 89, 174 (1976), *modified on other grounds,* 570 F.2d 157 (7th Cir. 1977). Such practices are unfair because they materially impede "a consumer's ability to make an economically rational choice, and a competitor's ability to compete on the basis of price, quality, service, or convenience." *Pfizer, Inc., supra,* 81 F.T.C. at 62. *See also, Commission Statement of Policy on Consumer Unfairness,* in Commission letter to Senators Danforth and Ford, Dec. 17, 1980. They are also deceptive because "[m]any consumers are likely to assume that when a product claim is advanced which is in theory subject to objective verification, the party making it possesses a reasonable basis for so doing and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part." *National Commission on Egg Nutrition, supra,* 88 F.T.C. at 191; *cf. Jay Norris Corp., et al.,* 91 F.T.C. 751, 855 (1978), *aff'd,* 598 F.2d 1244 (2d Cir. 1979).

There is no bright line test for deciding what quantum of evidence is needed to provide a reasonable basis. These determinations are best made in light of the particular facts in each case. However, the Commission has noted that the following factors are relevant: (1) the type and specificity of the claim; (2) the product involved; (3) the possible consequences of a false claim; (4) the degree of consumer reliance on the claim; and (5) the type and accessibility of evidence to support the claim. *Pfizer, Inc., supra,* 81 F.T.C. at 64.

Citing these factors, the ALJ concluded that Kroger's Price Patrol surveys were not designed and conducted according to procedures recognized as sound by survey experts, and, notwithstanding the company's advertising, failed to prove that shoppers would save overall by patronizing Kroger stores. He consequently held that Kroger had no reasonable basis for those claims and had advertised them in violation of Section 5. (ID at 76.) Kroger disagrees with this analysis of its surveys. It contends that, given the special difficulties

posed by retail food price surveys, its Price Patrols were reasonably sound and furnished adequate support for the savings claims that the ALJ determined had been made. We will consider these contentions presently. First, however, we must assess Kroger's threshold argument that the reasonable basis doctrine should not even be applied to comparative food price claims. [16]

Kroger asserts that the reasonable basis doctrine arose in the contexts of health and safety claims and complex, technical performance claims that could be verified by the manufacturer through a single test. It contends that such claims are distinctive, and that the rationales for requiring that they be reasonably substantiated do not apply in the case of comparative food price advertising. Health and safety claims, for example, warrant substantiation in view of the risks to which false representations would expose consumers. Here, no such risks are presented. Technical performance claims cannot be readily verified by consumers, whereas the advertiser can typically test them without undue expense. Here, Kroger's weekly survey claims would require frequent substantiation—even though, according to Kroger, shoppers could easily determine for themselves which supermarket is cheapest and market forces would discipline those stores whose price claims were false. (RAB 41.)

We do not find these arguments convincing. However one may characterize the claims in past substantiation cases, the Commission's opinions clearly indicate that the reasonable basis test was not confined to claims affecting health or safety. The *Pfizer* decision referred simply to "affirmative claims," 81 F.T.C. at 62, and in *National Commission on Egg Nutrition,* the Commission suggested that substantiation should be obtained for product claims capable in theory of objective verification, 88 F.T.C. at 191; *see also Jay Norris Corp., supra,* 91 F.T.C. at 854. The Commission did note in *Pfizer* that some claims may not require substantiation, but it spoke in that regard merely of puffing and hyperbole. It contrasted those subjective forms of advertising to specific product or service claims—precisely the kind of claims disseminated by Kroger in its Price Patrol campaigns. 81 F.T.C. at 64–65.

Moreover, we do not accept respondent's view that consumers can easily tell which store is cheapest. To make that determination accurately—and without relying on unsubstantiated advertising claims—consumers would have to shop comparatively each week among several stores over a significant period of time, an effort involving far greater inconvenience than it would be reasonable to demand of consumers.[20] It is true that the reasonable basis doctrine

[20] We do note, however, that the harm to consumers in this instance is not as great as it might be in cases

(Continued)

would require that Kroger's weekly food price survey claims be subject to repeated substantiation, but this fact alone does not suggest that Kroger's advertisements should be exempted from the reasonable basis doctrine. Rather, it raises the more complicated question, to which we now return, of whether Kroger's survey data did, in fact, adequately substantiate its Price Patrol claims. [17]

The ALJ determined that the Price Patrol surveys were methodologically unsound in several respects. First, he found that although the surveys systematically excluded meat, produce, house brands and certain other items, the advertisements did not clearly disclose these omissions (ID 114, 178.) Second, the ALJ found that, even among those product categories not excluded from the survey lists, Kroger's sampling procedures were deficient. He observed that samples were not drawn randomly, so as to supply a basis in probability theory for projecting sample results to a larger population of items. Survey samples were instead drawn by the same Kroger personnel who were responsible for implementing the company's Everyday Low Price policy. Relying on the testimony of both complaint counsel's and respondent's experts, the ALJ concluded that this combination of functions rendered the surveys unsound because it unreasonably increased the possibility of bias. (ID 183–187.) As to the Price Patrol samples themselves, he found that they were not representative because they were not weighted to reflect the frequency with which an average shopper bought certain foods, and because they contained disproportionately large numbers of rollers and high-volume, fast-moving items. (ID 179–182, 191–193.)

Lastly, the law judge determined that the advertised charts would not support any conclusion about whether consumers would save money shopping at Kroger. The flaw in the charts, according to the ALJ, was that they failed to show the differences between Kroger's and competitors' prices, and compared only the number of items on which Kroger had prices lower than its competitors—or vice versa. The ALJ found, however, that it was possible for Kroger to have had more lower-priced items than any other store and still be the most expensive overall. (ID 188–190.)

Kroger contends that the standards to which its surveys were held by the ALJ are unjustifiably strict. It asserts that no one has disputed the basic claim that its prices generally were as low as or lower than those of the competition. And while it admits that the

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where claims are impossible to verify prior to purchase, and the potential economic loss is high or there are significant health or safety risks associated with the use of a product. As previously noted, the nature of the injury resulting from an unsubstantiated claim is an appropriate consideration in determining what kind of substantiation is called for. See *Pfizer*, 81 F.T.C. at 64.

Price Patrol surveys were not perfect, it also claims that they reflected a sensible compromise between the ideals of statistical theory and the restraints imposed by limited financial resources. Kroger says that the Price Patrol surveys were comparable in quality to the kinds of surveys that businesses frequently rely on for long-range planning. Moreover, it argues that if the ALJ's tougher survey standards are upheld, comparative retail food price advertising will disappear, since no company will be able to afford the necessary substantiation. The short-term result, according to Kroger, is that consumers will no longer receive useful information on competing stores' pricing policies. That, in turn, will injure discount stores, who will be unable to advertise their lower prices; and by the same token, it will benefit higher-priced merchants, who can continue to attract business by touting superior service, selection, or other non-price attributes. [18]

The Commission recognizes the importance of these concerns. We have endorsed truthful comparative advertising[21] and do not intend to stifle it indirectly by requiring unneeded substantiation. The record in this case does not reflect how much the cost of respondents' Price Patrol campaign would have risen had the company's surveys fully matched[22] those described by complaint counsel's expert witness. Nevertheless, we are willing to assume that the increase would have been substantial. Furthermore, we agree that the evidence does not dispute Kroger's basic argument that its prices were frequently below or equal to those of its competitors. *See* RX 925–964. If respondent's advertising had actually been confined to making correspondingly limited claims, the data that it had—the Price Patrol and the Full Book and Burgoyne checks—would have come much closer to providing adequate substantiation.

As we have found, however, the Price Patrol claims were considerably more specific, and consequently, a good deal stronger as well. Respondent's advertising represented not only that Kroger was the low price leader, but also that it had run surveys which proved, on a weekly basis, consumers would save by shopping at its stores. The point was driven home by the tables in the advertisements showing the numbers of items on which Kroger's prices were below those of its competitors. In effect, Kroger made its own substantiating data an integral part of its advertising. Consequently, consumers and competitors may fairly expect that the substantiation will, in fact, closely match the representations made about it. *See Litton,*

[21] Commission Statement of Policy in Regard to Comparative Advertising (June 27, 1979).

[22] Although we ultimately find respondent's substantiation to be inadequate, we do not go as far as complaint counsel or their expert witness in terms of the survey procedures that Kroger must follow in the future.

Inc., No. 9123, slip op. at 7 (Jan. 5, 1981), *petition for review docketed*, No. 81–7148, 9th Cir., Mar. 12, 1981. It is thus inadequate for Kroger to say only that its surveys were a reasonable compromise between statistical ideals and financial realities, or that business executives would have relied on them for their day-to-day decisionmaking. Of course, even for proof-type claims, as we have here, some compromises in survey techniques may be appropriate, but the issue should not turn exclusively on cost or on whether the results would be acceptable to business executives, who undoubtedly are in a better position than consumers to understand the limitations and deficiencies of a survey. Rather, the issue should center on consumer expectations and the reasonableness of the procedures in light of those expectations and the other factors discussed in *Pfizer, supra,* at 64.

We emphasize that the best possible survey technique may not be required for this purpose. We recognize that in most instances it will be difficult to observe every relevant statistical nicety. The elements of a sound survey methodology may be expected, therefore, to vary according to the type of the **[19]**claim and the product or service involved. Still, this hardly means that every departure from statistical theory is permissible so long as it is dictated by cost. There are, we expect, certain statistical principles that may not be compromised without undermining a survey's reliability.[23] Where the demands of the purse require such compromises, the advertiser must generally limit the claims it makes for its data or make appropriate disclosures to insure proper consumer understanding of the survey's results.

In identifying those elements of survey design and implementation that are critical to the reliability of a food price survey, we have paid close heed to the three experts who testified in this case. The expert testimony adduced by complaint counsel and respondent has convinced us that the Price Patrol surveys were not methodologically sound and thus did not prove that shoppers would save overall at Kroger. Respondent's experts, Dr. Benham and Mr. Oliver, did state that the Price Patrol surveys offered "useful" and "adequate" comparative food price information when considered in light of other available data, such as the Burgoyne and Full Book survey results.[24]

[23] Dr. Kohout testified, "We have certain ideals that are derived from [the] philosophy of science and other sciences, and any study that's done in the real world would usually involve compromises with certain parts of that ideal.

There are, however, established standards for what compromises are acceptable and which ones are not, and if a study uses unacceptable compromises, then I would say we could call that study unsound. (Tr. at 1004–05.)

[24] Mr. Oliver testified on cross-examination as follows:

Q. Well, let me see if I can restate the question. Would you recommend that in part as a consideration

(Continued)

These endorsements support Kroger's view that it had a reasonable basis to believe its prices were generally as low as, or even lower than, those of most competitors. But they fall short of confirming what Kroger's advertisements actually claimed—that each Price Patrol survey won by Kroger *proved* it had the lowest prices around.

[21]Furthermore, respondent's experts based their opinions of the Price Patrol partly on the fact that the Burgoyne and Full Book data generally corroborated Price Patrol results.[25] However, it seems clear to us that these surveys cannot be used to substantiate claims that the Price Patrol was methodologically sound or that its results were tantamount to proof. Kroger did not rely on the Burgoyne and Full Book data to substantiate these claims. (ID 206, 223.) Nor could it have. The Burgoyne surveys and Full Book checks were not conducted in many of the cities in which Price Patrol advertisements were run (Tr. 2429, 2785) and, in any event, were conducted too infrequently to provide adequate support for the weekly survey claims.[26] Most importantly, Kroger "lost" to other stores in Burgoyne and Full Book surveys significantly more often than it did in the comparable Price Patrols. For example, in its Atlanta advertising campaign, Kroger claimed it had won every Price Patrol

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items be selected for a retail food price survey because they would likely be available at competitors' stores?

A. Yes, I think that should definitely be a consideration.

Q. Now, did I understand your testimony to be that the Price Patrol methodology, done the way you understand it to be done, was adequate demonstration of the fact that Kroger was lower overall in all categories of food? [20]

A. It was an adequate demonstration of the general pricing structure of the chain compared to other chains on items that you could compare.

Q. Was it an adequate demonstration of the fact that Kroger was lower overall in all categories of food?

A. Mr. Correia, you have a problem here. These are judgment samples. You try to take something you can compare and draw conclusions from. If that information is consistent with the information on the other products, then that seems to be a reasonable sort of judgment sample to do.

Mr. Correia: I move to strike that answer as nonresponsive.

Judge Hyun: Motion denied.

Q. Are you saying that you need to look at other information besides the Price Patrol to make that determination:

A. I think you should have other information at your disposal, Mr. Correia.

(Tr. 2785–86.)

Dr. Benham testified to similar effect on direct examination:

The Witness: Again, as I stated in my previous response, the information that the firm had internally to do its own monitoring, to make its own judgment about these matters, impresses me as being very useful information on which reasonable individuals will make a reasonable determination that, in fact, the stated policy of Kroger and the stated consequences of shopping with Kroger had a strong likelihood of being the actual experience of consumers in shopping at those stores. So—I will stop there.

(Tr. 2875; see also Tr. 2865.)

[25] Tr. 2786–2787 (testimony of Mr. Oliver). Dr. Benham did not testify specifically on whether Price Patrol information would be adequate if it were unsupported by Burgoyne and Full Book figures. His testimony, however, indicates that he always took account of the latter set of data when assessing Kroger's low price claims. See Tr. 2874, 2883–2884.

[26] The Burgoyne surveys were typically run on a quarterly basis and Full Book checks conducted once very four to five weeks on the average. (ID 224, 208.) A former Kroger grocery merchandiser testified, however, that each week the prices on 500 to 700 grocery items in respondent's stores were changed. (Tr. 1659.) He also testified that the Burgoyne results, at least, were outdated by the time they were received. (Tr. 1658.) Dr. Kohout stated his view that the monthly Full Book checks were likewise insufficient to support particular Price Patrol results. (Tr. 1059–60.)

survey between 1972 and early 1978. Yet, of twenty-nine Burgoyne checks run during the same period, Kroger finished second or worse ten times; of nineteen Full Book surveys also run during that period, Kroger was beaten by one or more competitors twelve times.[27] [22]

The qualified endorsement given the Price Patrol by respondent's experts, coupled with the unsuitability of the Burgoyne and Full Book data, cast doubts on whether the Price Patrol surveys are sufficient even as a supplementary form of substantiation. These doubts provide the backdrop to our consideration of expert testimony and other evidence on specific aspects of the Price Patrols that the ALJ found did not conform to sound statistical procedure.

1. Exclusion of Meat, Produce, and Other Items

Although respondent's advertising claimed that Price Patrol surveys proved Kroger was a cheaper place to shop than its rivals, the surveys did not compare prices on fresh meats, produce, certain dairy products, and store-brand items. These exclusions represented a significant portion of Kroger's business: meat and produce alone accounted for 28% of Kroger's retail food sales. (ID 29.) Furthermore, the Burgoyne and Full Book check results suggest that Kroger's meat and produce prices were significantly higher than its other grocery prices, relative to the competition. For example, the Burgoyne checks conducted in the Dallas, Delta, Central, and Southland KMAs showed that Kroger's prices on grocery products other than meat and produce were undercut by another competitor 19 percent of the time. However, Kroger's meat and produce prices were bettered by a competitor in 86 percent and 82 percent of the surveys, respectively. (ID 145; CX 251–282.)

Kroger asserts that fresh meats, produce, and certain other items sold in its stores are of a higher quality than what its competitors offer, and that it should be permitted to drop them from a comparative price survey for that reason. (RAB 35.) We do not disagree. However, all three experts who testified agreed that Kroger should at least have disclosed what types of products it had excluded from its surveys. (Tr. 1222, 2676, 2988–89.) This point strikes us as one of commonsense. If an advertiser systematically excludes a product from a survey sample, it should take pains to ensure that its advertising claims do not extend to that product, and

[27] RX 925, 947. Similarly, Kroger ran an advertisement in a June 1976 edition of a Chattanooga newspaper stating that it had lost a Price Patrol survey for the first time in 174 weeks. (RX 566.) However, during substantially the same period, it was a runner-up in five out of sixteen Burgoyne surveys. (RX 926.) See also CX 813.

it should therefore limit the scope of the claims by providing clear disclosure of the exclusion or by otherwise qualifying the claims. [23]

Kroger maintains that it did make disclosures, and that it invited consumers to check the actual survey lists. To be sure, the television commercials, and to some extent the newspaper advertisements, did suggest to consumers that they:

> check our report at Kroger. See why we believe Kroger is doing what it takes to stay the low price leader.

(RX 537, p.5.)

However, this invitation cannot itself discharge Kroger's responsibility to inform consumers of the survey's limitations. For one thing, the survey lists available at Kroger stores did not state that meat and produce had been systematically excluded. But even if they had disclosed this information, we do not think that Kroger's general invitation to "check our report" would have been adequate. Shoppers should not have been required to visit Kroger stores simply to learn facts that materially limited the Price Patrol claims, at least where Kroger could have limited its claims to begin with or could have made appropriate disclosures in the advertisements themselves.

A number of the television commercials also stated that the surveys consisted of comparisons of "popular brand name items." (*E.g.,* RX 537, pp. 1–4.) And, the record contains some commercials that were devoted entirely to informing consumers that Kroger's surveys checked prices on "national and regional brands" and that:

> We check identical brands in each store. We never compare store brands against national or regional brands. This wouldn't allow fair comparison.

(RX 535, p. 1.)

These are helpful disclosures, but they are inadequate to dispel the notion engendered by Kroger's other television commercials that the Price Patrol results were applicable to all types of Kroger merchandise. While the televised disclosures mentioned that store brands were not matched against national or regional brands, they fail to reveal that store brands were excluded from the surveys entirely. The commercials are similarly opaque about the exclusion of meat and produce. To be sure, the announcer notes that the surveys compared popular name brand products—which would exclude most meat and produce items—but given the sweeping claims made for the survey results, a more specific disclosure is necessary to ensure that shoppers understand the survey's limitations. This is particularly true here, where the survey results are represented as proof of an overall savings claim and where Kroger knew that its meat and

produce were priced somewhat higher, relative to the competition, than were its other grocery products.

Disclosures did begin to appear in at least some newspaper advertisements in 1976. For example, a full page advertisement contained the following notice: [24]

Price Patrol checks only items which are totally or practically identical in each of the stores checked. Fresh meat, fruits and vegetables cannot be accurately compared due to variations in grades, sizes, trim, etc.

(RX 595.)

The disclosure neglects to mention, however, that store brand items were not surveyed. Furthermore, it began to appear only toward the end of the Price Patrol campaign, and after the complaint in this matter issued. Even then, the disclosure was inadequate because it was inconspicuous and only intermittently used.[28]

Consequently, we hold that Kroger failed to disclose adequately that its surveys excluded fresh meats, produce, and certain other products, and that given the claims made for the survey results in its advertisements, this failure was inconsistent with sound survey procedures.

2. Sampling Procedures

Complaint counsel's expert, Dr. Kohout, stated that survey samples should be drawn randomly, if at all possible, to minimize the chance that the conscious or unconscious biases of those conducting the survey affect the results. (Tr. 1047.) He also favored the use of random sampling because it enables one to quantify how accurately the sample results may be projected to the population as a whole. (Tr. 1303.) It is thus possible to determine whether sample data provide statistically significant results; *i.e.,* results that one may confidently conclude are not chance occurrences but reflect a definite pattern in the population. By contrast, Dr. Kohout said that judgment samples—samples selected by persons using their expertise as to which assortment of items fairly represent the general population—leave room for the entry of personal bias and do not provide any basis for determining whether the data obtained are statistically reliable. (Tr. 1303–1304.)

Kroger used judgment sampling procedures in developing its Price Patrol survey lists. While it agrees that random sampling is the preferable approach, it contends that its judgmental techniques were dictated by the peculiar problems of conducting comparative price surveys among retail food stores. The chief difficulty is that

[28] See *e.g.,* complaint counsel's First Request for Admissions, Attachments 3(p), 3(q), 3(r), 3(s), all of which are newspaper advertisements disseminated in late 1976 and in 1977 without the disclosure.

competing stores typically carry only some of the same brands of products. (*See* RX 1003, pp. 81, 87.) Thus, if one draws a random sample of the goods carried in a particular store, there are excellent odds that one will find only a few of the same items on competitors' shelves. Kroger asserts that this high degree of unavailability makes it extremely difficult—perhaps impossible—to use random sampling procedures for food price comparisons, unless the **[25]**comparisons are made between non-identical products.[29] Kroger believes that such comparisons could mislead consumers, who might not understand that price differences may reflect, to some degree, variations in the quality of grocery items carried by competing stores.

The ALJ evidently accepted Kroger's position on the impracticability of random sampling in the circumstances presented and did not rule that it was essential to a methodologically sound food price survey.[30] However, he did conclude that if judgment samples are used, those persons responsible for selecting the samples must not have a stake in the survey's outcome. That is precisely what occurred here. The Grocery Merchandisers who prepared the Price Patrol survey lists were also responsible for successfully implementing the Everyday Low Price policy. The ALJ held that the combination of these two functions was inconsistent with sound survey methodology. **[26]**

Kroger contends that the only personnel who had the expertise to select judgment samples of food items were its Grocery Merchandisers. It states that it would have been prohibitively expensive to use an outside firm for the selection of survey samples because the firm's employees would have required extensive, time-consuming training to learn how to make appropriate sample selections. (RAB 38.) Since Kroger has cited no evidence to support this assertion, we cannot affirm its accuracy.[31] In any event, all three expert witnesses agreed

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[29] The object lesson for Kroger is the Commission's own Retail Food Price Survey (RFPS). This project was first announced in 1973 as an effort to devise a survey protocol for comparing the overall cost of shopping at various supermarkets. 38 FR 1543 (Jan. 15, 1973). Staff began by compiling a randomly selected sample of grocery items that was sufficiently large to permit statistically reliable projections of the results to the stores in general. To its dismay, the staff discovered that very few of the sample items were available at the stores included in its test surveys, and subsequent attempts to control for the high incidence of product unavailability proved unsuccessful. Eventually, the staff opted for a different sampling approach. Put simply, it used data from the U.S. Department of Agriculture (USDA) to classify all grocery products into roughly 1,466 categories; it grouped these categories into strata based on unit price, and it then instructed surveyers to select a product from each stratum in each store. According to the staff memoranda in the record, this approach was believed to afford the most efficient means of obtaining statistically reliable price comparison among stores. However, because the products selected in the various stores would not be identical, the approach would provide consumers with no information concerning the quality of the goods in each store. (*See* RX 1003, ID 275–285.)

[30] Complaint counsel did not appeal, so we presume they have no difficulty with this determination. Since the suitability of judgment sampling is not an issue before us, we express no opinion on when it may properly be used in lieu of random sampling.

[31] The ALJ found that the annual cost of conducting weekly Burgoyne surveys in 100 cities would be about $644,020. (ID 230.) As he noted, however, that estimate did not include the overhead costs of the supervising Kroger employees' time and the costs of their office facilities. It also did not include the probable cost of training a staff of

(Continued)

that the function of sample selection should not have been combined with that of pricing. (Tr. 1037–38, 2713, 2789, 2989–90.) It is not hard to understand why. One Grocery Merchandiser testified that after he prepared a Price Patrol survey sample he made a point of accepting "roller" discounts on the products in the sample, so as to ensure that Kroger performed well on the surveys. (JX 1, Pellin deposition at pp. 58–61.) Such conscious efforts to influence Price Patrol results may have been atypical. However, personal bias may operate unconsciously, too (Tr. 2990), and other Grocery Merchandisers may have acted in a similar manner without realizing it. The important point is that the mixture of functions evident here is plainly inconsistent with the notion of impartiality that one naturally expects to be reflected in sound survey design. Accordingly, we affirm the ALJ's conclusion that Kroger's use of Grocer Merchandisers to select the Price Patrol samples did not conform to procedures that survey experts would regard as sound. **[27]**

3. Representative Sampling

The ALJ also faulted Kroger for failing to weight its sample results to correspond to the actual purchasing patterns of typical consumers.[32] By the same token, he found that the Price Patrol samples generally consisted of a disproportionately large number of high-volume items and "rollers." (ID 179, 182.) The record shows that these categories of products represent a minority of the items carried on supermarket shelves. (RX 979.) Thus, it is possible that a Kroger store which discounts high-volume and roller items drastically may "win" a Price Patrol survey, and yet be more expensive overall due to its higher prices on other types of items. (RX 906; Tr. 2769.)

While there was, again, general agreement among the expert witnesses that systematic weighting is a desirable element in survey design, the record reflects that, like random sampling, it may be impracticable in food price comparisons. The prerequisite to systematic weighting is information on the frequency with which certain types of goods are purchased, or data on the proportions of consumer spending attributable to various categories of goods. (Tr. 1053–54.)

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outside consultants to take the place of the Kroger employees presently involved in planning and evaluating the Burgoyne data. Nevertheless, we note that even if the original estimate were trebled, the sum would represent only a small percentage of Kroger's 1978 advertising budget. (See ID 5 *in camera*.)

[32] Weighting is a process of statistically adjusting samples—or data generated by samples—to make them more representative of the populations being measured. (ID 192.) In the case of a comparative food price survey, systematic weighting requires knowledge of the frequency with which consumers buy particular food items or categories of food items. (See Tr. 1053–54.) If it is known that, for example, consumers purchase 2 lbs. of potatoes per week, a weekly survey of the relative cost of shopping at various stores could be weighted by doubling each store's price for 1 lb. of potatoes. There are also methods of applying data on typical food purchasing patterns to the selection of the sample items themselves, so that the final sample will afford comparative price data on the overall costs of shopping for food at the stores surveyed. This type of sample is called self-weighted. (Tr. 1053).

The RFPS memoranda show that the USDA has such information on food items but not on other products commonly sold in supermarkets. (RX 1003 at p. 30.) Thus, if Kroger were to have conducted a systematically weighted Price Patrol survey, it would have been required to generate considerable information on its own about purchasing patterns, not merely in Kroger stores but in its competitors' stores as well. Concededly, this would at least have been an expensive undertaking. [28]

Kroger says that it attempted to weight its samples by focusing on high-volume products, and it argues that while these products may not, as a group, represent a majority of supermarket items, they do account for a sizable share of the consumer's expenditures on grocery items. Kroger also points out that its focus on high-volume products naturally resulted in a disproportionately large number of rollers on its survey lists because "roller" discounts are given primarily on fast moving goods.

Given these difficulties of producing a systematically weighted sample in a food price survey, we do not think that Kroger's Price Patrol was unsound simply because it was not systematically weighted. Whether its attempts to compensate for the lack of weighting data were adequate is a more difficult question to answer. The record does indicate that fast-moving products—the types of items that typically appeared on the survey data—do account for a sizable proportion of shopping expenditures. (CX 803.) However, the record also shows that Kroger's selection criteria were designed not merely to produce representative samples, but also to ensure that the items surveyed were those that shoppers would typically recognize. (ID 63.) In our view, the company's concern for consumer recognition has little to do with sound survey methodology, and it may be questioned whether Kroger's judgment samples might have been more effectively weighted had the company concentrated solely on developing a truly representative sample. Nevertheless, complaint counsel did not adduce evidence specifically on the adequacy of Kroger's attempts to weight its survey samples on an *ad hoc* basis. Consequently, we are not ready to conclude that the overrepresentation of high-volume products, including rollers, was itself indicative of unsound survey procedures. [29]

4. Advertising Format

As previously mentioned, Kroger's television and newspaper advertisements presented Price Patrol survey results in the form of box scores showing the numbers of items on which Kroger's prices were higher than, lower than, and equal to those of its competitors.

The ALJ cited approvingly Dr. Kohout's testimony that these figures could not support a claim that it was cheaper to shop at Kroger than elsewhere. (ID 189.) According to Dr. Kohout, a store may have more lower-priced goods than its competitors but still be more expensive for shoppers generally if the margin of savings on the lower-priced items is exceeded by substantially higher mark-ups on other commodities. (Tr. 1052.)

Of course, the issue of how to present the Price Patrol data is almost academic; since the Price Patrol surveys were not methodologically sound, no method of presenting their results could support Kroger's "proof of overall savings" claims. Furthermore, even if the Price Patrols had been methodologically sound, the proper question would not be whether the advertised results supported Kroger's "proof of overall savings" claim but whether any results tabulated for Kroger's own use supplied the necessary substantiation.

The record indicates, though, that Kroger itself tabulated Price Patrol data in only one form—that of the box scores showing merely the numbers of items on which Kroger's prices were higher than, lower than, or equal to those of its competitors. Kr. Kohout's criticisms could thus be applied to Kroger's internal records as well as to its advertising format.

We agree with Dr. Kohout that the best way of supporting an overall savings claim with survey data would be to compare the total costs of buying the survey items at each of the stores visited. Nevertheless, we are not prepared to say that the box score approach used by Kroger would have been inadequate to support a "proof of overall savings" claim. If the Price Patrol surveys had been methodologically sound, we believe that it is likely that Kroger would have had a reasonable basis to believe that the store with more lower priced items would, in the vast majority of instances, also be the cheaper place to shop.

In challenging Kroger's use of box scores, complaint counsel cite two situations where Kroger advertised it had won a Price Patrol survey but where a competitor actually had a lower total price for the survey sample. (RX 125, RX 906.) [30]Nevertheless, given the hundreds of Price Patrol surveys run by Kroger over the course of the campaign, something more than these two isolated instances is required to persuade us that the box score data could not substantiate a lower overall price claim if sound survey procedures were employed.

5. Summary

We hold that Kroger's Price Patrol surveys were not conducted

according to sound procedures because they failed to disclose the systematic exclusion of certain categories of products to which the survey results were generalized, and because Kroger failed to ensure that those persons who selected the survey samples were not in a position to bias the results. The Price Patrol surveys, therefore, also failed to substantiate adequately Kroger's claims that it had "proof" that consumers would save overall by shopping at Kroger. As a result, the Price Patrol advertisements were deceptive and unfair.

C. Procedural Objections

Kroger has assigned error to several of the ALJ's rulings on discovery, the admissibility of evidence, and the scope of cross-examination during trial. The first of these objections concerns the ALJ's refusal to permit Kroger to discover internal Commission documents, or portions of such, that set forth the personal views of staff members and individual Commissioners concerning the Retail Food Price Survey.[33] Second, Kroger contests the ALJ's decision to exclude from the record any RFPS documents which had not been approved by the Bureau of Consumer Protection or by the Commission itself. Third, Kroger asserts that the testimony of complaint counsel's expert witness, Dr. Kohout, should be disregarded because it was not permitted to cross-examine him on certain material that he used in forming his opinion.

We have previously affirmed the administrative judge's discovery rulings[34] and, after reviewing the record once more, we again conclude that his actions were proper. Recommendations or other statements of opinion in internal agency memoranda, if not explictly adopted as official agency policy are privileged from discovery absent a demonstration of compelling [31]need. *British Oxygen Co.*, 83 F.T.C. 1785 (1974). Kroger does not dispute this. Instead, it argues that the Commission waived the privilege by bringing suit, and that, in any event, respondent's need for the RFPS documents outweighed the agency's interest in their continued confidentiality. As to the supposed waiver, the Commission has consistently ruled that the agency's decision to bring a law enforcement action does not vitiate any privilege that may apply to intra-governmental memoranda. *Coca-Cola Co.*, 85 F.T.C. 398 (1975); *Chock Full O' Nuts, Corp.*, 82

[33] See *Memorandum Order Ruling on Motions to Limit Subpoenas Duces Tecum*, at 2 (dated Oct. 27, 1977); *Order Ruling on Respondent's Motion for Reconsideration of the Order of October 27, 1977, and Alternatively, Request for and Immediate Appeal from that Order*, at 2 (dated Jan. 9, 1978). The administrative law judge's orders permitted discovery of factual portions of internal RFPS memoranda and of evaluative portions that had been explicitly endorsed or adopted by the Commission as a whole.

[34] *Order Affirming Order Ruling on Respondent's Motion for Production of Documents Pursuant to §3.36*, at 1 (dated Feb. 1, 1979).

F.T.C. 747 (1973); *see also Wirts* v. *Continental Finance & Loan Co. of West End,* 326 F.2d 561, 563 (5th Cir. 1964). As to respondent's asserted need for RFPS information, it is sufficient to note that Kroger was in fact allowed to discover the non-privileged parts of RFPS documents, namely factual discussions in the memoranda and statements of official agency policy. It thus had access to significant portions of the RFPS materials, and we are not persuaded that it had particularized need for the privileged segments.

We are also satisfied that the judge acted properly in declining to admit RFPS documents that had not been approved by either the Bureau of Consumer Protection or the Commission. Kroger argues that a number of these documents portrayed the difficulties staff encountered in developing a random sample food price survey methodology and show the staff's increasing pessimism about the likelihood of ever developing such a protocol. In our view, the rejected exhibits cited by Kroger on appeal contribute little or nothing to an understanding of the issues in this case.

A number of exhibits proffered by respondent are simply preliminary versions of staff memoranda that were ultimately sent to the Commission and were, in their final form, admitted into evidence. While one might have some interest in determining how the staff refined its views of RFPS over successive drafts of a memorandum, it would be an interest purely historical in nature. We fail to see how these drafts, unapproved by the Bureau Director, shed additional light on what constitutes a sound survey methodology. We similarly fail to see the relevance of a memorandum cited by Kroger that merely advises the Commission of the staff's projected timetable for completing the RFPS effort. That the staff encountered delays in the project is already made clear from other documents in evidence.

Kroger also urges that the ALJ should have accepted memoranda from the Bureau of Economics and the Office of Policy Planning, which it claims argue against continuation of the RFPS on economic and policy grounds. Neither memorandum discussed the feasibility of conducting a random sample food price survey or the elements essential to sound survey methodology. They therefore add little to the factual development of the case. [32]

The last procedural objection concerns a seven-page excerpt of a staff-authored RFPS memorandum that complaint counsel gave to Dr. Kohout to help him prepare his testimony. The excerpt was also given to respondent.[35] However, Kroger claimed that the excerpt's

[35] The excerpt was accepted into evidence as RX 1022. It lists general principles of survey methodology that the Commission staff attempted to implement in conducting experimental comparative food price surveys. Much of the remainder of the RFPS memorandum describes the practical difficulties of applying these principles.

disclosure to Dr. Kohout had effected a waiver of the privilege for internal agency memoranda, and it accordingly sought a copy of the whole RFPS memorandum, identified as RX 1005, for purposes of cross-examining Dr. Kohout. At first, the administrative law judge denied the motion on the ground that the remaining portions of the memorandum contained nothing relevant to Dr. Kohout's cross-examination. (Tr. 1245.) Later, the judge concluded that the memorandum's privileged status had been waived, and he ordered the respondent be given the document in full. He did not permit Kroger to recall Dr. Kohout to the witness stand, however. Kroger contends that, had it been able to do so, it would have used the memorandum on cross to demonstrate that aspects of Dr. Kohout's proposed survey methodology were not viable. Respondent argues that the denial of this opportunity for effective cross-examination requires reversal.

We are inclined to agree with Kroger that complaint counsel impliedly waived the privilege for the full RFPS memorandum[36] and that the ALJ should have permitted Kroger to call Dr. Kohout back to the stand for additional cross-examination. We need not pause to resolve these issues, however, for it is clear to us that whatever errors may have occurred did not substantially prejudice Kroger's rights. Kroger cross-examined Dr. Kohout at length concerning his opinions, and though it was undeniably deprived of the impact of confronting the witness with the staff's actual experiences in conducting the RFPS, it was at least able to question him on some of the problems in his recommended methodology that were highlighted in the staff memorandum. More importantly, during defense hearings, Kroger's own witnesses were able to state their criticisms of Dr. Kohout's methodology, and Kroger introduced a survey that it had conducted in conformity with Dr. Kohout's recommendations in order to show the anomalous results that they could produce. **[33]**

Disqualification

Kroger argues that ALJ Hyun should have been disqualified from participating in this case because he served as an attorney-advisor to former Chairman Engman from March 12 to September 30, 1973, during which time he would have had access to staff and Commission memoranda concerning early stages of the RFPS. Kroger contends that staff predictions about the viability of the RFPS were uniformly optimistic during this period and that Judge Hyun's exposure to

[36] If a waiver occurred, it was not simply because the excerpt was disclosed to complaint counsel's witness; rather it was because the witness also relied to some extent on the excerpt in forming his opinion and then gave testimony on that opinion. See *United States* v. *Alvarez*, 519 F.2d 1036, 1045–46 (3d Cir. 1975); *Lalance & Grosjean Mfg. Co.* v. *Haberman Mfg.*, 87 F. 563 (S.D.N.Y. 1898).

such optimism preconditioned him to believe that it would be feasible to conduct a random sample comparative food price survey. Alternatively, Kroger argues that it should at least be granted additional discovery of Commission files so that it can more precisely show, as a predicate for its disqualification motion, that the RFPS and this case are factually related.

Standards for the disqualification of an ALJ were recently considered in *Grolier* v. *FTC,* 615 F.2d 1215 (9th Cir. 1980). At issue there was the construction of the third sentence of Section 554(d) of the Administrative Procedure Act:

> An employee or agent engaged in performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The court concluded that this provision, like the rest of Section 554(d), was designed to ensure that cases were not determined either by persons who had developed a will to win through previous partisan involvement or by persons who would be likely to interpolate *ex parte* information into the determinative process. **[34]**

The court, therefore, held that Section 554(d) precludes former attorney-advisors to the Commissioners "from participating [as ALJs] in the adjudication of cases in which they have actually performed ['investigative and prosecuting'] functions, and in 'factually related' cases." 615 F.2d at 1221. The court further said:

> Once an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions' through prior acquaintance with *ex parte* information, 554(d) says he 'may not . . . participate or advise in the decision' . . . of the case. *Id.*

In such circumstances, disqualification is required even if the judge cannot recall the *ex parte* facts to which he or she was exposed. The court did conclude, however, that the party moving for disqualification bore the burden of proving that the ALJ actually was apprised of disqualifying information; one could not presume, for example, that the former attorney-advisor had been apprised of certain information simply because he or she would have had access to it as an advisor. To aid the movant in establishing actual involvement, *Grolier* held that the agency involved was responsible for producing sufficient evidence to permit an accurate determination under Section 554(d). It suggested that an agency could fulfill this duty by responding in the form of affidavits as to the existence and extent of the ALJ's prior involvement with the litigation at hand or a factually related case.

Prior to the Ninth Circuit's decision in *Grolier,* the Commission considered and rejected Kroger's motions for the disqualification of ALJ Hyun and for discovery of Commission files on the Retail Food Price Survey. 93 F.T.C. 202 (1979); 93 F.T.C. 302 (1979). After *Grolier* was announced, however, we reconsidered our ruling and directed complaint counsel, ALJ Hyun, and the Commission Secretary to file affidavits on the factual relatedness of the Retail Food Price Survey to the *Kroger* case and on the likelihood that Judge Hyun would have been apprised of information concerning the RFPS or Kroger pricing policies while he served as an attorney-advisor to former Chairman Engman. *Order of June 5, 1980.*[37]

Complaint counsel's affidavit denied that there was any factual relation between the RFPS and this case, and asserted that the origin of the Kroger investigation was independent [35]of the RFPS. ALJ Hyun stated in his affidavit that he had no documents in his files revealing any prior involvement on his part with the RFPS prior to being assigned to this case.[38] The Secretary's affidavit similarly averred that no Commission records disclosed whether Judge Hyun had participated in the RFPS. The Secretary did state, however, that his inquiry revealed that 55 documents concerning the RFPS or Kroger's pricing policies had been sent to former Chairman Engman's office prior to and during ALJ Hyun's tenure as attorney-advisor.

On February 24, 1981, we directed the Secretary to forward these documents to the Commission, and on April 3, 1981, we ordered that they be made available to the parties *in camera* for their comment.[39] The parties filed their briefs on May 8, 1981.

Kroger asserts that during Judge Hyun's tenure as attorney-advisor he was likely to have been exposed to the RFPS memoranda that the Secretary has forwarded. Kroger also asserts that these *ex parte* communications were disqualifying because there is sufficient evidence to show that the RFPS is factually related to this case. In this regard, Kroger notes particularly that staff attorneys in the RFPS project collected information specifically about Kroger's

[37] In our previous ruling, we held that Kroger had neither due process nor statutory rights to discovery or to the disqualification of ALJ Hyun. Our reconsideration of that ruling was limited to the construction of Section 554 of the APA. Our previous holding on due process rights to discovery or disqualification here is left undisturbed.

[38] ALJ Hyun had previously stated that he had no recollection of being exposed to the RFPS during his tenure as attorney-advisor. See *Order Ruling on Respondent's Motion for Production Pursuant to Section 3.36 and Certifying the Rulings to the Commission* (Jan. 15, 1979).

[39] Kroger contends that our decision to release these documents, which include staff memoranda and Commissioner circulations about the RFPS, demonstrates that the ALJ erred in denying Kroger's pre-trial discovery requests for such materials. We have already affirmed the ALJ's rulings in this opinion. See text accompanying notes 33–35, *supra.* Our decision to release certain RFPS memoranda to the parties for the limited purpose of resolving Kroger's disqualification motion is not inconsistent with this affirmance. The release we have ordered was intended solely to illuminate any *ex parte* knowledge that Judge Hyun may have had concerning issues of fact in this case.

discount pricing policies and practices. Kroger also asserts that discussions of survey design in RFPS memoranda were directly relevant to issues in this case. **[36]**

It is unnecessary to dwell on Kroger's arguments that ALJ Hyun was likely to have seen the RFPS memoranda that were before the Commission during his tenure as an attorney-advisor.[40] Disqualification would not be warranted even if Hyun actually had read all of those memoranda.

For one thing, we do not believe that the RFPS qualifies as a factually related "case," which is a prerequisite to a successful disqualification motion under Section 554(d). The RFPS is certainly not the type of adversary proceeding that the word "case" typically connotes. And neither the language nor authoritative interpretation of Section 554 suggests that "case" should be given an expansive reading here. By its terms, Section 554 applies only to adjudicative matters that must be decided on the record after opportunity for an agency hearing. 5 U.S.C. 554(a). Furthermore, the *Attorney General's Manual on the Administrative Procedure Act* advises that "[t]he limitation of the prohibition against consultation to those who performed investigative or prosecuting functions 'in that or a factually related case,' should be construed literally." *Id.* at 54 n.6 (1947).

However, even if we assumed that the RFPS was a case, we could not conclude that the other conditions to disqualification under Section 554(d) have been fulfilled here. Under *Grolier,* Judge Hyun can be disqualified only if it is shown that (1) the RFPS is a "factually related" case, and that (2) Judge Hyun was "engaged in the performance of investigative or prosecuting functions through acquaintance with *ex parte* information" concerning the RFPS. **[37]**

In our June 5, 1980, order, we stated that cases may be factually related if they arise from a common nucleus of operative facts;[41] and, assuming that the RFPS was a case, we suggested that it might

[40] Respondent's argument that Judge Hyun received *ex parte* information on the RFPS is based largely on a letter dated August 4, 1980, to Kroger counsel from former Chairman Engman. See Exhibit A to *Response of the Kroger Company to Affidavits Filed Pursuant to the Commission's June 5, 1980, Order* (filed Aug. 8, 1980). Mr. Engman stated in this letter that he has no record of Mr. Hyun's working on RFPS matters as an attorney-advisor. However, Mr. Engman also stated that he discussed "significant matters coming before the Commission at conferences with all [his] attorney-advisors" and "[t]hus it is possible that [RFPS memoranda of March 22 and April 13, 1973] would have been discussed at such a conference." Kroger asserts that the RFPS was indeed a significant matter for the Commission during early 1973, so that ALJ Hyun must have been acquainted with the RFPS while he worked in the Chairman's office.

Even if Judge Hyun did learn of the RFPS through the former Chairman's staff meetings, the extent of his knowledge is still entirely unknown. Mr. Engman's letter does not indicate whether the supposed discussion of the RFPS at these staff meetings was likely to have been cursory or detailed. The fact that ALJ Hyun cannot remember learning anything about the RFPS during his tenure as attorney-advisor suggests that any staff discussion of the project was less than extensive.

[41] See also *Grolier,* Docket No. 8879, *Order Denying Motion to Disqualify Judge von Brand* at 10–12 (filed Aug. 12, 1981).

be factually related to the present proceeding if it involved Kroger's pricing policies and practices.

But, beyond showing that the RFPS was factually related to this case, Kroger must also show that Judge Hyun was performing an investigative or prosecuting function through his exposure to *ex parte* information concerning the RFPS. Common sense suggests that not just any *ex parte* communication concerning the RFPS should suffice to disqualify Judge Hyun. Rather, it appears that the necessary *ex parte* information must concern in some way those operative facts that are common to the RFPS and this case. Otherwise, there would be little sense in conditioning disqualification on proof that the ALJ had previously investigated or prosecuted a factually related case.

We also believe that disqualifying *ex parte* information must concern the facts in issue in the instant proceeding. This standard is embodied in Section 554(d)(1), which forbids an ALJ from engaging in *ex parte* consultations with any party or person on a "fact in issue." It is an appropriate standard to apply to this case for two reasons. First, it would be anomalous if an ALJ could be disqualified for having been exposed in a prior case to *ex parte* information that was more innocuous than that proscribed in Section 554(d)(1). Second, the *Grolier* court itself relied on Section 554(d)(1) in defining the scope of an attorney-advisor's "investigative or prosecuting functions." 615 F.2d at 1219–20.

Thus, even if it is assumed that the RFPS is a case, ALJ Hyun can be disqualified only if Kroger shows that the RFPS is factually related to this proceeding, and that Judge Hyun's supposed contact with RFPS memoranda during his tenure as attorney-advisor exposed him to facts at issue here.

Kroger attempts to demonstrate factual relatedness by drawing our attention to a January 29, 1973, memorandum from the Bureau of Consumer Protection, advising the Commission whether the staff had investigated the possible deceptiveness of low price claims made by a certain grocery chain. The Bureau's memorandum stated that the staff was not investigating that particular company's claims but was instead developing [38]the RFPS protocol to secure information about which supermarket chains in given metropolitan areas actually do provide the lowest prices. The memorandum noted in passing that "many other firms, including Kroger, Safeway, Stop & Shop and National" were making discount claims. No other mention is made of Kroger in the memorandum. We cannot conceive how this document could show that the RFPS and the present case share a common nucleus of operative fact, much less the specific facts in

issue. A simple reference to the existence of Kroger's low price claims in a memorandum describing the general purpose of the RFPS is plainly insufficient to prove factual relatedness.

Kroger has also pointed out that, in the latter half of 1973, RFPS staff obtained data directly from Kroger about aspects of its pricing and advertising policies. This information might well establish that the RFPS and *Kroger* are factually related in the sense that somewhere in the RFPS files there is material that may concern operative facts in this case. However, for the purposes of the instant motion, the critical question is whether Judge Hyun was apprised *ex parte* of this information about Kroger's pricing and advertising. There is no evidence that information was ever conveyed to the Commission, so it is impossible to say that Judge Hyun learned of it when he was an attorney-advisor. Indeed, Kroger does not even argue that the ALJ was apprised of the information *ex parte.*

Respondent does argue, however, that in 1973 ALJ Hyun was likely to have been exposed *ex parte* to RFPS memoranda concerning proper survey design and the feasibility of developing a statistically valid food price survey. Respondent contends that such memoranda concern the issues raised by this case and that the ALJ's involvement with the RFPS would have led him to believe that a reliable, low-cost food price survey could be accomplished with ease. However, none of those memoranda contain data that would have related the RFPS to facts in issue here.[42] The memoranda do not, for example, discuss Kroger's pricing practices or its advertising campaigns. Rather, they concern only general issues of survey design. These matters are certainly relevant to the appropriate level of substantiation for survey claims. However, they do not concern the factual issues that were litigated here, such as the meaning of Kroger's advertisements and the particular procedures Kroger used to compare its food prices with those of its competitors. Accordingly, the RFPS memoranda that were before the Commission when ALJ Hyun was an attorney-advisor did not contain information that would justify his disqualification under Section 554(d). **[39]**

Even if it were assumed that these memoranda concerned facts in issue here, we believe that Judge Hyun's disqualification would be unnecessary. As stated in *Grolier,* Section 554(d) is designed to ensure that decisionmakers have neither the will to win nor the ability to interpolate facts not already in the record. Kroger has not

[42] See *Attorney General's Manual on the Administrative Procedure Act* 130 (1947) (reprinting Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945): "The term 'fact in issue' is used in its technical, litigious sense." This suggests that Section 554(d)(1) prohibits *ex parte* consultations only as to "adjudicative" facts, that is "facts concerning the parties—who did what, when, how, why, with what motive or intent. . . ." 2 K. Davis, Administrative Law Treatise Section 12:3 (1979).

alleged that ALJ Hyun had a will to win. As to the likelihood that facts not on the record would be interpolated, we note that the most comprehensive RFPS memoranda produced by staff have actually been admitted into evidence. RX 1000, 1003. *See Grolier,* Docket No. 8879, *Order Denying Motion to Disqualify Judge von Brand* at 9 (filed Aug. 12, 1981).[43] Thus to the extent Judge Hyun's possible knowledge of the RFPS in 1973 matched the information in the adjudicatory record here, there is no risk that Judge Hyun would have been able to "interpolate facts and information discovered by [him] *ex parte* and not adduced at the hearing. . . ." *Grolier* v. *FTC,* 615 F.2d at 1219.[44]

We therefore conclude, on the basis of the affidavits submitted and the RFPS memoranda forwarded by the Secretary, that the disqualification of Judge Hyun is unwarranted. Kroger, however, has raised objections to the adequacy of the Secretary's search for documents, ordered by the Commission in its orders of June 5, 1980 and February 26, 1981. Kroger complains that a search should have been made of the files of the Division of Management and the Assistant Director for Legal Coordination, since both offices participated in the RFPS. Neither office currently exists; their files have been merged with those of the Executive Director, whose records were searched. Kroger also contends that the files of individual Commissioners' offices should be searched. Not wishing to leave any stone unturned, we have asked the Secretary to review each Commissioner's files for additional documents concerning the RFPS or Kroger pricing policies that would have been before the Commission during ALJ Hyun's tenure as an attorney-advisor. No new documents were found. **[40]**

Finally, Kroger makes two requests in aid of its effort to establish the factual relatedness of the RFPS to this case. First, it has moved that we place on the record a staff memorandum of October 31, 1978, discussing a request by an attorney for clearance to participate in this proceeding. Second, Kroger asks that, if its disqualification motion is denied, it be allowed discovery of all the Commission's

[43] In this regard, it is also worth noting that much of the RFPS staff's thinking about survey design and the feasibility of statistically valid food price surveys were actually matters of public record at the time ALJ Hyun would have seen them. See the Commission's proposed protocol for the RFPS which was published for comment at 38 FR 1543 (Jan. 15 1973).

[44] It is also difficult to conceive how Judge Hyun's supposed *ex parte* involvement with RFPS information actually injured the respondent. While ALJ Hyun concluded that statistically sound comparative food price surveys are feasible, his initial decision certainly discloses an appreciation of the practical problems they present. Moreover, the ALJ's recommended order does not require Kroger to adopt the random sample methodology on which the RFPS was based. We therefore fail to see any injury from the alleged *ex parte* communication. Where it can be shown that an *ex parte* contact has in fact resulted in no substantial prejudice to a party, there can be no reversible error. 5 U.S.C. 706; *Marathon Oil Co.* v. *EPA,* 564 F.2d at 1265 (9th Cir. 1975); see also *Attorney General's Manual on the Administrative Procedure Act* 73–74 (1947).

RFPS files so that it can better demonstrate the factual relationship between the RFPS and this case. These requests are denied in view of our conclusion that, even if the RFPS does constitute a "factually related case," none of the documents Judge Hyun might have seen as an attorney-advisor contained disqualifying information. [41]

Order Provisions

The ALJ issued a cease and desist order that would impose detailed and comprehensive restrictions on Kroger's use of comparative food claims in future advertising. The order extends to any claim that Kroger's prices are lower than those of particular competitors or of the competition as a whole in a particular area. The ALJ's order would prohibit such claims unless: (1) they are based on a survey conducted according to sound survey procedures; (2) the claim presents the survey's results fairly and impartially; and (3) the survey's results and methodology are available for inspection at Kroger stores.

The ALJ defines sound survey procedure somewhat differently depending on whether the comparative claim refers to survey results or not. Where the comparative price claim does make such a reference, the underlying survey must conform to specific methodological criteria concerning issues such as the selection of survey samples and the competitors to be compared. If the survey fails to meet these criteria, Kroger may not refer to the survey results in its advertising.

Comparative claims that do not refer to survey data must still be founded on substantiating survey results. However, the sound survey procedure requirements are slightly more relaxed for such advertisements. If the supporting survey does not meet each of the methodological criteria referred to above, the general comparative price claim may be advertised if it also discloses each criterion on which the survey is deficient.

The order would prohibit the dissemination of any comparative retail food price claim—whether or not it refers to surveys—without an accompanying disclosure that the amount consumers will save at Kroger depends on what they purchase. This and any other disclosure required under the order would have to satisfy detailed guidelines on acceptable format in print and broadcast advertising.

Kroger has objected strenuously to the ALJ's order, arguing that

its only effect will be to eliminate comparative retail food price advertising.[45] Respondent's first objection to the order concerns its breadth: it is not limited to covering price claims based on survey sample data, but would apply to any claim that Kroger's prices are lower or lowest, presumably [42]even when the claim concerns only a comparison of prices charged by Kroger and one competitor on a particular food item. Kroger argues that such simple one-to-one price comparisons hardly warrant the elaborate sampling procedures and cautionary disclosures set forth in the ALJ's order. Kroger further contends that the sampling procedures are unnecessary—and unwise—even in the case of survey-based claims. The order provides that samples should be drawn on the basis of either random selection or the judgment of an independent consultant. As noted above, respondent argues that these alternatives are too expensive to be employed and that it can conduct comparative food price surveys only if it can use its own employees to select judgment samples.

Of course, the ALJ's order would allow Kroger to select its own judgment samples provided that its price claims did not purport to be based on survey data and its advertisements disclosed that the underlying survey samples were not randomly selected or chosen by an independent party. Kroger argues that this whole disclosure scheme is unrealistic, however, since the number of disclosures that the order would require for an affordable survey would be excessive. Such disclosures would, moreover, have to be presented in accordance with guidelines specified in the order; for example, print disclosures would have to appear in 16-point type and TV disclosures would have to remain on the screen for the entirety of the commercial.[46] [43]

Complaint counsel, in their answering brief, have proposed a number of changes to simplify the ALJ's order.[47] The Council on

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[45] Kroger's concerns about the ALJ's order are echoed in an *amicus* brief filed by the Food Marketing Institute.

[46] Kroger also contends that the ALJ's order violates the First Amendment because it is not the least restrictive method of regulating the company's advertising. In *Central Hudson Gas and Electric Corp.* v. *Public Service Commission*, U.S. (1980), the Supreme Court held that the First Amendment protects truthful commercial speech from governmental regulation that is not essential to the promotion of a substantial governmental interest. However, the Court also held that no constitutional protections extend to speech that is deceptive or related to illegal activity. It lies within the Commission's power to prohibit such speech and to frame orders that are effective in preventing the recurrence of misleading advertisements. *Jay Norris, Inc.* v. *FTC*, 598 F.2d 1244, 1251–53 (2d Cir. 1979). We find it unnecessary, however, to resolve these constitutional issues, since the order we issue today is a significantly narrowed version of the ALJ's proposal, and does reflect the least restrictive alternative to regulating survey-based food price claims. The modifications we have made were impelled not so much by constitutional constraints as by an appreciation of the need to allow for flexibility in the design of comparative food price surveys.

[47] Among them is the deletion of the mandatory disclosure that the amount consumers would save by shopping at Kroger would depend on what they purchased. Complaint counsel felt that this disclosure is not essential since its message was fairly apparent. Kroger argues that this "concession" on complaint counsel's part undermines the determination that the Price Patrol advertisements represented consumers would save overall by shopping at Kroger. (RRB 16–19.) We do not agree. The belief that one will save overall at Kroger is not at all inconsistent with the logical notion that the amount one saves will depend on what or how much one buys.

Wage and Price Stability (COWPS) also submitted an *amicus* brief that supports those suggestions but recommends additional modifications to ensure that truthful comparative food price advertising is not discouraged in the future. COWPS has suggested that the order not attempt to specify exactly how Kroger must conduct a retail food price survey, but attempt instead to simply guide it to a number of acceptable alternatives for such surveys.

As was stated previously in this opinion, the Commission is fully cognizant of the importance of avoiding unnecessary restraints on truthful, comparative advertising. It has therefore endeavored to ensure that the order issued in this case is no broader than necessary to address the violations that have been established in this case or closely related conduct. The Commission's order is thus much narrower and simpler than that issued by the ALJ. [44]

Paragraph I of the Commission's order sets forth the definition of "survey-based food price comparison claim," which in turn defines the breadth of the order as a whole. While the ALJ's order would have applied to any comparative food price claim, the definition used here provides for a more limited reach. The definition covers only comparative price claims that both refer to survey results *and* project the results obtained from a specific survey sample to items not included in the survey. As limited, the definition is focused precisely on the distinctive characteristics of Kroger's Price Patrol campaign. The definition would not cover a variety of comparative price claims commonly made by supermarkets, including Kroger, that do not refer to price surveys. For example, the definition does not apply to "rifle shot" claims—simple comparisons made of an advertiser's and a competitor's prices on a particular food item or product (*e.g.,* a comparison of prices charged by two stores for a 5 lb. roast). Nor does the definition cover comparisons made on an item by item basis of the prices charged for a number of listed products, as often appears in newspaper food sections. Finally, it does not cover claims, unaided by reference to survey data, that the advertiser is lower in price than its competitors. (*See, e.g.,* RRB, Appendix B.) Such general comparative price claims must, of course, be reasonably based, and it may well be that adequate substantiation must consist of a survey of some sort. However, this case does not present such simple comparison price claims, and we are not prepared to declare in the abstract what substantiation those types of claims would require. They are thus wholly outside the scope of the order we have issued.

Part II of the Commission's order contains all of the substantive provisions affecting Kroger's future dissemination of survey-based

food price comparisons with specific competitors or with the competition in a particular locale. It begins by prohibiting such claims unless they are based on a survey, test, or comparison that is reliable and competent. This general admonition simply reflects established law that tests and surveys necessary to substantiate a claim be designed and implemented in a trustworthy manner. *Litton Industries, Inc.*, Docket No. 9123 (Jan. 5, 1981) [97 F.T.C. 1], *petition for review docketed,* No. 81–7148, 9th Cir., Mar. 12, 1981.

This provision is also comparable to the ALJ's requirement that surveys be conducted according to sound survey procedures. However, in contrast to the ALJ, we have not attempted to spell out the specific procedures that are essential to a reliable and competent food price survey. As we stated above, [45]sound methodology—at least in the context of food price comparisons—depends partly on the practical obstacles presented in a particular case and partly on the advertising claims ultimately disseminated about the survey. These factors are infinitely variable, and no single list of "essential" survey techniques would be suited to each possible circumstance.[48]

We have, however, specified procedures to be followed in selecting survey samples, since that is the area in which Kroger's Price Patrol design was deficient. The ALJ's order would permit Kroger to assemble its own samples if it uses random selection techniques, but would allow only an outside consultant to develop judgment samples. Kroger has protested against this restriction on the ground that random sampling is infeasible and the cost of training a consultant to pick judgment samples exorbitant. The record clearly indicates that significant obstacles stand in the way of random selection—at least in the context of retail food price comparisons. The expense of training a consultant is harder to gauge, but complaint counsel appear to concede that no consultant is currently prepared to select its own judgment samples. Finally, the deficiency we found in Kroger's methods of selecting Price Patrol samples was not actually the company's reliance on its employees' expertise to make selections but the fact that they had responsibility over both selection and pricing. Accordingly, our order permits Kroger employees to continue to select representative judgment samples. However, the order also provides that the Kroger employees responsible for pricing merchandise must not know which items have been selected for

[48] Consequently, we have not required Kroger to follow criteria specified by the ALJ for selecting the competitors to be compared in surveys, or for identifying the individual stores to be surveyed. Our omission of these requirements does not mean that we believe they need never be met in food price surveys. Rather, we feel that their significance may vary from case to case, and we hesitate to require that they be observed in every instance. Furthermore, there is no persuasive evidence in the record that Kroger excluded significant competitors from its surveys or that its Price Patrollers were directed to competitors' stores that charged atypically high prices.

survey samples until after the survey is completed. This requirement is needed to ensure that the prices on sample items are not cut disproportionately as a means of enhancing Kroger's performance on the survey. [46]

The Commission order also provides that whenever judgment samples are used, the items whose prices are compared must be identical or substantially similar, or dropped from the survey. This provision appeared in similar form in the ALJ's order, and is, we think, clearly warranted in connection with the use of judgment samples. We do not understand Kroger to object to this provision in principle. Kroger has complained about the order's definition of "substantially similar," which it contends will favor the cheaper grocer with lower quality goods. This possibility certainly exists. However, it should be remembered that the surveys under discussion here are designed to compare price, and if it is impossible to hold quality constant among the various stores being surveyed, it seems reasonable to ask that the company conducting the survey not favor itself by comparing the prices on its cheapest brands with those of the competitor's highest quality brands.[49] On the other hand, it is quite understandable that Kroger would not wish to conduct surveys which benefit merchants with lower quality goods. Kroger's alternatives under the order are to exclude such merchants from its surveys or to exclude specific product categories in which clear quality differences appear. In the latter case, as is explained below, Kroger must limit its survey claim so that survey results are not projected to the products that have been excluded.

The requirement that identical or substantially similar products be compared does not extend under our order to surveys based on randomly selected samples. The record indicates that it is extremely difficult to develop a randomly-drawn sample that is both generally representative of one store's product pricing policy and consists of items that can be found on the shelves of other stores. One apparent solution to this dilemma recommended by complaint counsel's expert witness is to abandon any effort to compare the prices charged by different stores on the same goods, but to select equivalent though not identical random samples from each store. (Tr. 1074–1084.) While it would thus be impossible to compare stores' prices on an

[49] The ALJ's order provided that when an identical or substantially similar item could not be found at a particular store, the item would have to be dropped from the survey completely and its deletion noted (presumably in the survey descriptions to be posted in Kroger stores rather than in the advertisements themselves). We have not incorporated this provision into our order. It may well be that respondent's inability to compare the prices on all sample items at each competitor will not seriously affect the reliability of its survey results—the fact that one or two items of a large sample may be unavailable for comparison at one store does not clearly suggest that the samples compared in other stores must also be modified. However, a high incidence or a prolonged period of unavailability may require adjustments in the survey sample.

item by item basis, the stores' general pricing policies could be compared. The order accordingly allows Kroger to conduct such a random sample survey, provided, of course, that it is reliable and competent. [47]

The second paragraph in Part II prohibits the dissemination of survey-based food price comparisons that do not fairly present the results of the surveys on which they are based. It also forbids claims that generalize survey results to product categories that were systematically excluded from the supporting survey. This specific restriction responds, of course, to Kroger's practice of generalizing Price Patrol results to all of its food products, even though meat, produce, and certain other items were customarily kept off of the survey sample lists.[50] Kroger can ensure that its survey-based food price comparisons are not generalized to products that were systematically excluded either by limiting the advertisement's affirmative claim to begin with (*e.g.*, "Our survey shows we have the cheapest canned goods in town") or by prominently disclosing the excluded product categories.

While we have not required Kroger to make such disclosures in any particular format, the order does state that they must be clear and conspicuous. To be clear, the disclosure should fairly and comprehensively communicate what goods have been systematically excluded. Categorical descriptions should suffice in most instances. For example, in the Price Patrol campaign, it would have been adequate to have the advertisements state conspicuously that "meats, produce, and certain dairy products have been excluded from the Price Patrol surveys."[51] It is more difficult to prescribe what steps must be followed to ensure that a disclosure is conspicuous. That determination can be made conclusively only after assessing the net impression of a given advertisement. However, in print advertisements, the size and color of the disclosure relative to the rest of the copy and the disclosure's proximity to the survey-based claim will obviously be important factors. They will likewise be important in broadcast advertising although in radio and television commercials additional variables—such as when the disclosure occurs in the advertisement and whether it is announced over sound effects—will also play a role in determining the disclosure's conspicuousness. [48]

[50] The limitation on generalized claims applies only to the extent that categories of products have been excluded systematically. We recognize that no sample or series of samples is likely to include every product stocked in a grocery store, and we do not mean to suggest that that fact alone forbids a grocer from projecting the results of an otherwise valid survey to his store as a whole.

[51] Some of Kroger's post-1976 newspaper advertisements contained clearly worded statements of which categories of items had been excluded. However, those disclosures were neither conspicuous nor regularly made.

Kroger has voiced no objection to the provisions comprising the remainder of the order. These sections are fairly standard and are designed to ensure respondent's compliance with the order's substantive provisions.[52]

Lastly, when this opinion was in the final stages of consideration by the Commission, respondent submitted a request for permission to file a brief addressing the question whether, in view of the decision in *Francis Ford, Inc.* v. *FTC,* 1981–2 Trade Case ¶ 64271 (9th Cir. 1981), *petition for rehearing pending,* Nos. 79–76–47, 79–7654 (filed Sept. 22, 1981), certain issues raised by this case should properly be addressed through rulemaking. The Commission believes that *Francis Ford, Inc.* v. *FTC, supra,* does not correctly state the law and, in any event, the instant case is clearly distinguishable. Moreover, respondent has not offered sufficient justification for a further round of briefing at this late date. For these reasons, respondent's request to file an additional brief is denied.

[52] One aspect of the ALJ's order that was designed in part to promote compliance was a requirement that Kroger post detailed descriptions of its survey methodology and results in its stores. We have decided, however, not to include this provision in our final order. So long as Kroger's surveys are competent and reliable and their results fairly presented, as the Commission's order requires, there is no legal need for Kroger to tell consumers exactly how its surveys are designed and precisely how the sample data break down. The disclosure of such information would be salutary, of course, but it does not appear necessary to prevent deception.

367-444 O - 82 - 49 : QL 3

Appendix

Selected Price Patrol newspaper advertisements and television commercial scripts.

Campbell-Mithun, Inc.
ADVERTISING

PLEASE REPLY TO ADDRESS CHECKED:

☐ [illegible] Chicago, Illinois 60601 Tel. 312-[illegible]
☐ [illegible] Denver, Colorado 80204 Tel. 303-[illegible]
☐ [illegible] Minneapolis, Minnesota 55402 Tel. 612-[illegible]

Cable Address CAMITHUN

CLIENT APPROVAL

TV COMMERCIAL COPY

JOB NO. 5-283-660
CLIENT Kroger/Southland
CODE NO. TV-30-SOU-155 LENGTH :30
TITLE Guest Price Patroller

STA.-NET. Atlanta--WSB/WAGA/WXIA/WTCG
DATE-TIME 6/20/76-6/26/76

☐ PRODUCTION COPY ☐ AS FILMED/AS TAPED COPY ☐ LIVE ☐ VO/SLIDE

VISUAL	AUDIO
1. OPEN ON MCU OF GUEST.	1. GUEST: Believe me...the Kroger Price Patrol really does find out who has the low prices in Atlanta.
2. PULL OUT TO REVEAL HER ON STOOL BESIDE SANDY. LOGO HANGS ABOVE: LIMBO SWEEP. BELOW IS LARGE BLOW-UP OF CHART.	2. SANDY: Hi, I'm Sandy of the Kroger Price Patrol and this is Mrs. Taylor. We asked her if she'd join us on a weekly price check.
3. CUT TO MRS. TAYLOR WITH CHART BESIDE HER. ON LINE "AND KROGER REALLY DID..." SHE POINTS TO LOWER COLUMN.	3. GUEST: I helped them check prices on 150 items at each of the ___ major Atlanta food retailers and Kroger really did have more low prices than any of the other stores we checked.
4. CUT BACK TO SHOT OF 2 WOMEN, CHART & LOGO.	4. SANDY: See the copy of our latest report at Kroger and see why so many homemakers like Mrs. Taylor believe Kroger really is Atlanta's low price leader!

BC/rk
6/16/76

FEDERAL TRADE COMMISSION
Docket No. 9102 Respondent Exhibit No. 537-10
Date Identified
Date Received 2/6/79
Date Received
In the matter of KROGER COMPANY
Witness Hoover/Stec
Reporter Breitner
By

Rx 537, p. 10
40816

T-101-M

Campbell-Mithun, Inc.
ADVERTISING

PLEASE REPLY TO ADDRESS CHECKED:

Cable Address CAMITHUN

CLIENT APPROVAL

TV COMMERCIAL COPY

JOB NO. 6-283-658
CLIENT Kroger/Southland
CODE NO. TV-30-SOU-101 LENGTH 30
TITLE Price Patrol #24
STA-NET. Atlanta--WSB/WXIA/WTCG
DATE-TIME 4/25/76-5/1/76

☐ PRODUCTION COPY ☐ AS FILMED/AS TAPED COPY ☐ LIVE ☐ VO/SLIDE

VISUAL	AUDIO
1. OPEN ON FULL SHOT OF LADIES WITH LOGO	1. The best way to find out who really has the low prices in the Atlanta area is to check the __ leading food retailers each week.
2. DIRECTOR'S CHOICE	2. That's what the Kroger Price Patrol does.
3. COMPARISON CHART SUPER: "PRICES CHECKED WEEK ENDING APRIL 9,1975"	3. We checked prices on 150 popular name brand items, and found Kroger lower on this many items.....higher on this many items... and the same on this many items...
HOLD CHART	4. Once again, Kroger was lower on more grocery items than any other store we checked.
5. DIRECTOR'S CHOICE	5. Read our complete report at Kroger. See why we believe Kroger is doing what it takes to stay the Atlanta low price leader.

CD:jmm
11/7/75

CD/rk
4/12/76

FEDERAL TRADE COMMISSION
Docket No. 9102
Respondent Exhibit No. 537-2
Date Identified
Date Received 2/6/79
Date Returned
In the matter of KROGER COMPANY
Witness Hoover/Stec
Reporter Braitner
By RH

Rx 537, p.2
40827

RX 540, p 1

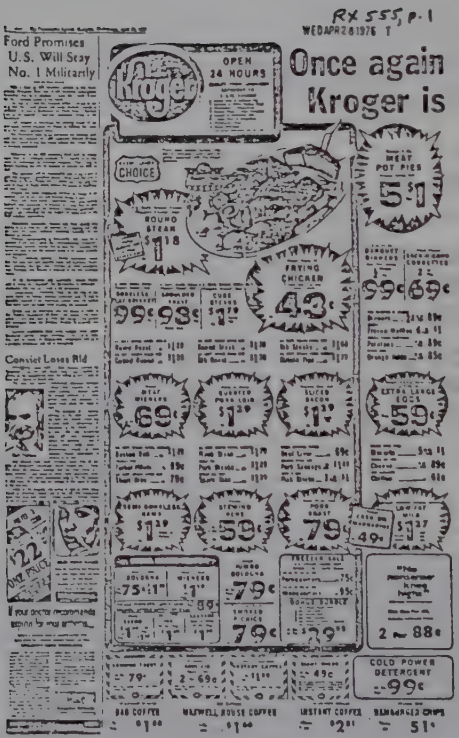
PRICE PATROL SEES...

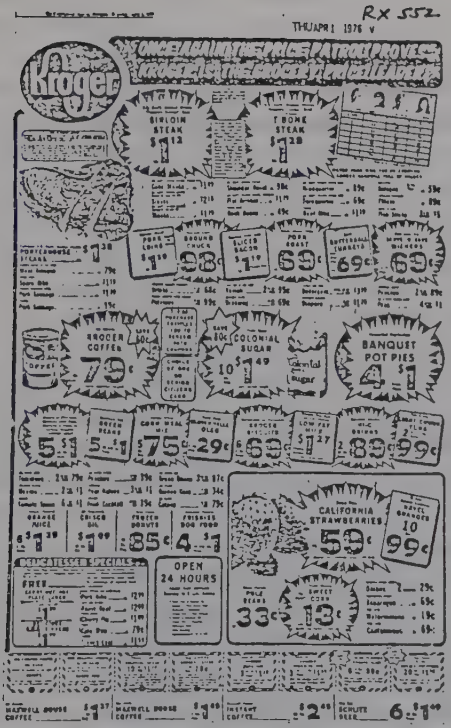
KROGER IS THE LOW PRICE LEADER IN ATLANTA

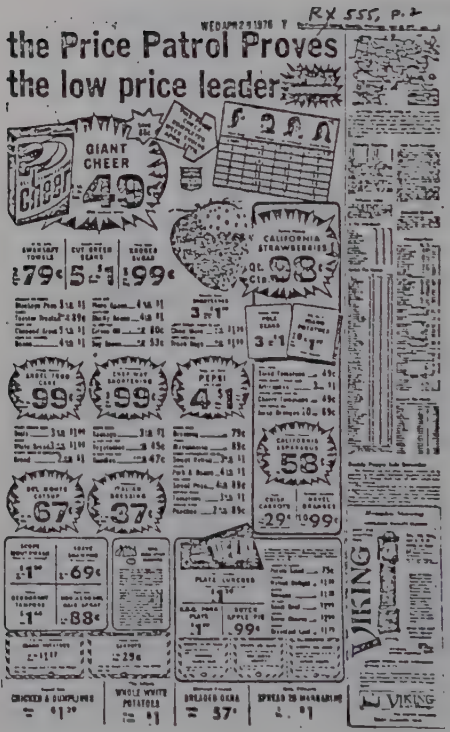
38 STRAIGHT

STORE	KROGER WAS LOWER ON THIS MANY ITEMS CHECKED	KROGER WAS HIGHER ON THIS MANY ITEMS CHECKED	KROGER WAS THE SAME ON THIS MANY ITEMS CHECKED
A	73	20	54
B	96	9	10

RX 540, p 2
C 100 22 21
D 76 27 47
E 98 20 22
F 129 4 8
G 118 7 8
ACTUAL CHECK LIST FOR WEEK ENDING AUGUST 18, 1973 AVAILABLE AT ALL KROGER STORES FOR YOUR INSPECTION.


RX 555, p. 1
WED APR 28 1976 T
Ford Promises
U.S. Will Stay
No. 1 Militarily
Once again
Kroger is
OPEN
24 HOURS
CHOICE
ROUND
STEAK
FRYING
CHICKEN
43¢
MEAT
POT PIES
5 $1
99¢
69¢
Consist Loses Rld
69¢
59¢
79¢
49¢
2 for 88¢
COLD POWER
DETERGENT
99¢
MAXWELL HOUSE COFFEE
INSTANT COFFEE
51¢


RX 552
THUAPR 1 1976 V
Kroger
SIRLOIN STEAK
T-BONE STEAK
BANQUET POT PIES
CALIFORNIA STRAWBERRIES
OPEN 24 HOURS


RX 555, p. 2
the Price Patrol Proves
the low price leader
GIANT CHEER
49¢
CALIFORNIA STRAWBERRIES
98¢
79¢
99¢
99¢
99¢
PEPSI
58¢
67¢
37¢
29¢
99¢
69¢
88¢
99¢
29¢
VIKING
VIKING

Dissenting Statement of Commissioner Bailey

A majority of the Commission has concluded that Kroger violated the Federal Trade Commission Act not because its claims of lower grocery prices through its Price Patrol advertising campaign were false or because the company lacked adequate substantiation for these claims. Rather, according to the majority, Kroger's Price Patrol ads not only asserted that Kroger's prices were generally lower than its competitors but also contained implied claims that the Price Patrol survey was a "methodologically sound", "statistically projectible" study which "proved" Kroger prices were lower. The majority concludes that these implied claims were not substantiated.

I dissent from the majority's finding of liability in this case because I fundamentally disagree with my colleagues' interpretation of the advertisements at issue: I believe that the ads merely claimed Kroger's prices were lower than its competitors. According to the Commission's opinion and the evidence developed in this case, the general claims of lower prices probably were substantiated by Kroger, although implied claims of a "methodologically sound", "statistically projectible" survey were not. Since I do not read the ads to contain such implied claims, I would dismiss the complaint. [2]

In addition to my disagreement with the majority's reading of the ads and the standards they have applied in defining adequate substantiation for them, I am moved to dissent from their opinion because this case is also important from a policy perspective. Despite the relatively narrow order entered, I fear that the majority opinion will chill the development of useful comparative price advertising, especially among retail grocers, which is extremely useful to the public, particularly in times of high inflation. I was not a member of the Commission when this complaint was issued and it is clearly too late to revisit that decision. However, it is worth noting, as the majority does, that the Commission's intervention resulted in respondent's suspension of the Price Patrol or any similar advertising campaign. That result is at least as unfortunate, in my view, as the ultimate finding of liability that the Commission issues today.

As the majority opinion implicitly acknowledges, the relationship between the nature of the claims made in an advertisement and the substantiation which will be required for those claims is a dynamic one; generally, the more factual and assertive the Commission finds the claims, the higher the level of substantiation it will demand. Recently, the Commission has explored in several cases the presence of implied claims that a factual assertion has been scientifically proven. This type of claims triggers the highest standards for

adequate substantiation. On the opposite end of the spectrum, a claim which is mere "puffery" may require no substantiation at all. (*See, e.g., Pfizer, Inc.*, 81 F.T.C. 23, 64) Balancing these interactive criteria and distinguishing between the many shades of gray that any particular set of facts may produce is admittedly a difficult and sensitive task.

In the instant case, the majority has derived three basic claims from Kroger's Price Patrol advertisements. First, the majority concludes that the ads only claimed that Kroger had *more* items with lower prices than its competitors, thereby reversing the Administrative Law Judge's (ALJ) finding that the ads claimed *most* items in Kroger stores are priced lower. I agree with the majority's holding on this point.

Second, the majority concludes that the challenged advertisements also claimed that shoppers would save overall at Kroger. Once again, I agree that the ads at issue made this claim.

Finally, the majority holds that the ads conveyed the impression that Kroger had "projectible" and "methodologically sound" statistical surveys to "prove" its lower price claims. I emphatically disagree with that conclusion. [3]

The majority's derivation of this "methodologically sound proof" claim occurs in two stages: (1) the Price Patrol surveys were offered as "proof" of the overall savings claim because "the commercials invite consumers to assume that the Price Patrol data can be projected reliably to all types of items sold by Kroger"; and (2) "[i]nherent in the proof claim is the notion that the surveys were conducted in such a way that their results are reliable enough to prove the overall savings representation. This is simply a definition of methodological soundness." (Slip op. at pg. 13) I cannot agree that consumers would ever make the inferential leap suggested by my colleagues concerning the "methodological soundness" of the Price Patrol surveys.

Kroger made no effort to disguise the nature of the Price Patrol; rather, the fact that patrols were composed of homemakers with practical experience in managing a family budget was highlighted in the advertisements. Every effort was made to create a familar, informal atmosphere; the ads sometimes even incorporated comments that a particular Price Patroller's absence from the group was due to a recent childbirth or the family's transfer to another city. Further, the actual Price Patrol survey results were included in the ads in the form of a box score laying out very specifically and clearly the total number of items which had been surveyed, and showing on which Kroger either: (1) "was lower on this many items checked"; (2)

"was higher on this many items checked"; or (3) "had the same price on this many items checked." In most of Kroger's television commercials, and some of its newspaper advertisements, the company directed consumers' attention to the checklists used by Price Patrollers which were regularly posted in Kroger stores and showed both what items had been surveyed and what prices had been charged. As the majority acknowledges, one Kroger study found that between 8 and 30 per cent of food shoppers who associated the Price Patrol campaign with Kroger had referred to the checklists in the stores. (Slip op. at pg. 5) Although the checklists could not completely cure any deception allegedly inherent in the advertisements, they demonstrate Kroger's effort to delineate the survey's scope accurately.

I am convinced that, in dramatic contrast to the majority's interpretation, the overall impression actually created by the advertisements was that some homemakers enlisted by Kroger had conducted a limited survey of between 100 and 150 individual grocery items which showed that in most cases Kroger either had the same or lower price than its competitors. The notion that these surveys were "methodologically sound" and therefore "prove" an overall "projection" of lower prices is simply, in my view, an artificial construct imposed by the majority on the ads in question. [4]

Kroger cites the Commission's decision in *Pfizer, Inc., supra,* to support its contention that the "folksiness" of the Price Patrol campaign belies any implied claims of "statistical proof" and "methodological soundness." I agree both with respondent's reading of that case and its application to the facts at issue here.

Finally, I would note that complaint counsel offered no extrinsic proof concerning the meaning of the Price Patrol advertisements and instead relied on the ALJ's and the Commission's expertise to interpret the claims at issue. The ALJ rendered his findings that complaint counsel had met the burden of proving that certain claims were in the ads on a motion for summary judgment. The majority upholds the ALJ's decision, over respondent's objections, because summary judgment is appropriate when the challenged claims are "so *clearly conveyed* by an advertisement that *no genuine issue as to their existence* can be raised." (emphasis added, Slip op. at pg. 10) Obviously, I disagree that the challenged claims were so clearly conveyed as to remove "any genuine issue" concerning their existence and thus I find the procedural context and resultant evidentiary basis for the majority's opinion on this threshold issue particularly troubling.

Having arrived at a different interpretation of the advertisements than the majority, the question remains whether the Price Patrol surveys were adequate substantiation for the claims I believe were contained in the ads. To answer this question, I must turn to the majority opinion:

> [W]e agree that the evidence does not dispute Kroger's basic argument that its prices were frequently below or equal to those of its competitors. *See* RX 925–964. If respondent's advertising had actually been confined to making correspondingly limited claims, the data that it had—the Price Patrol and the Full Book and Burgoyne checks—would have come much closer to providing adequate substantiation.
>
> As we have found, however, the Price Patrol claims were considerably more specific, and consequently, a good deal stronger as well. . . . In effect, Kroger made its own substantiating data an integral part of its advertising. . . . The expert testimony adduced by complaint counsel and respondent has convinced us that the Price Patrol surveys were not methodologically sound and thus did not prove that shoppers would save overall at Kroger. . . . (Expert) endorsements support [5]Kroger's view that it had a reasonable basis to believe its prices were generally as low as, or even lower than those of most competitors. But they fall short of confirming what Kroger's advertisements actually claimed—that each Price Patrol survey won by Kroger *proved* it had the lowest prices around. (Slip op. at pgs. 18–19)

As I read the majority's opinion, the Price Patrol, Burgoyne and Full Book surveys were close to adequate substantiation for general lower price claims made by Kroger but could not substantiate the implied claim that Kroger had performed a "methodologically sound" survey. Since I do not see the latter claim in the ads, it follows that even under the majority's somewhat restrictive analysis of Kroger's substantiation, the claims I read in the ads were probably substantiated.

My conclusion that no liability should be found here is underscored by my belief that consumers could clearly understand from the face of the ads the limitations of the Price Patrol survey and therefore the limitations of Kroger's substantiation for its general lower price claims. The majority worries that daily grocery shoppers, unlike business executives, may be incapable of understanding the deficiencies of surveys such as those Kroger performed. (Slip Op. at pg. 18) On the contrary, I believe that daily grocery shoppers are at least as capable as business executives of evaluating the clearly disclosed parameters of surveys like the Price Patrol and applying their results to routine purchasing decisions.

Final Order

This matter has been heard by the Commission upon the appeal of respondent, and upon briefs and oral argument in support of and in opposition to the appeal. The Commission, for the reasons stated in

the accompanying Opinion, has granted the appeal in part, and denied the appeal in part. Therefore,

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except as is otherwise inconsistent with the attached Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to Cease and Desist be entered: [2]

Order

I.

A. *Respondent* means The Kroger Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, acting directly or indirectly through any corporation, subsidiary or other device in the sale of food, household items and other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

B. *Survey-based food price comparison* means an advertised claim that refers to a survey of respondent's and any competitor's food prices and that projects the results obtained from the survey sample to items not included in the survey.

II.

It is ordered, That respondent cease and desist from advertising any survey-based food price comparison that refers, directly or indirectly, to a particular city, metropolitan area or competitor (or competitors) by name or other designation unless:

A. The survey that forms the basis for the claim is designed and executed in a competent and reliable manner. In addition to such other procedures necessary for competency and reliability, the selection of items for the survey shall be made by respondent or an independent outside firm either:

(i) randomly from the population of products to which the results will be generalized in the claim; or

(ii) in such a way as to make the items representative of the population to which the results will be generalized in the claim;

provided, that employees responsible for pricing respondent's mer-

chandise do not know which items have been selected for the survey prior to its completion. [3]

If selections are made pursuant to subparagraph (ii), the items whose prices are compared should be identical or substantially similar. For the purposes of this paragraph, substantially similar means:

a) branded items which are the lowest priced items available in a product category;

b) meats identical in cut or grade;

c) produce items of the same type and geographic origin; and

B. The claim fairly and impartially presents those conclusions that may validly be drawn from the survey and does not generalize the results of the survey to a product category that has been systematically excluded therefrom; *provided, however,* that no such generalization will be deemed to extend to any product category whose systematic exclusion is disclosed clearly and conspicuously in respondent's advertisements.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this Order upon it, file with the Commission a written report setting forth in detail the manner and form in which it has complied, or intends to comply, with this Order.

IV.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That the allegations contained in Paragraphs Six B and D, and Seven B and D, of the Complaint be, and they hereby are, dismissed.

Commissioner Bailey voted in the negative.

IN THE MATTER OF

KENNECOTT CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3075. Complaint, Sept. 28, 1981—Decision, Sept. 28, 1981

This consent order requires, among other things, a Stamford, Conn., manufacturer engaged in the production of various products, including fabric air filter bags utilized in the control of industrial air pollution, to timely divest its subsidiary, the Filter Media Division, "FMD," in accordance with the terms of the order. Pending such divestiture, the firm is required to operate its prospective acquisition, National Filter Media, as a separately managed entity. The order further bars the company from certain acquisitions for a period of ten years without prior Commission approval.

Appearances

For the Commission: *Steven R. Newborn, Michael Antalics, Nancy Markowitz,* and *Virginia L. Snider.*

For the respondent: *Richard E. Carlton* and *Richard Lyons, Sullivan & Cromwell,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, Kennecott Corporation ("Kennecott"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. For purposes of this Complaint, the following definitions apply:

a. The term *baghouse* means a system used for the filtration of particulate matter from gas streams for environmental and safety reasons or for the recapture of valuable particulates.

b. The term *fabric air filter bag* means a tubular or non-tubular,

seamed or seamless bag, varying in length, width and material, which is used within air pollution control systems called *baghouses.*

II. KENNECOTT CORPORATION

2. Kennecott is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal executive offices at Ten Stamford Forum, High Park Ridge, Stamford, Connecticut.

3. At all times relevant herein, Kennecott has been and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission and Clayton Acts, as amended.

III. DORR-OLIVER INCORPORATED

4. Curtiss-Wright Corporation ("Curtiss-Wright") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices at One Passaic St., Wood-Ridge, New Jersey.

5. Dorr-Oliver Inc. ("Dorr-Oliver") is a corporation organized and doing business under and by virtue of the laws of the State of Delaware with its principal offices at 77 Havemeyer Lane, Stamford, Connecticut. Dorr-Oliver is a wholly-owned subsidiary of Curtiss-Wright.

6. At all times relevant herein, Curtiss-Wright has been and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission and Clayton Acts, as amended.

IV. ACQUISITION

7. On January 29, 1981, Kennecott and Curtiss-Wright entered into an agreement for the sale of Curtiss-Wright's Dorr-Oliver subsidiary to Kennecott for approximately $110,000,000.

V. TRADE AND COMMERCE

8. The relevant geographic market is the United States as a whole.

9. The relevant product market is the manufacture and sale of fabric air filter bags.

10. Concentration in the manufacture and sale of the relevant product is high.

11. There are barriers to entry into the manufacture and sale of the relevant product.

12. Both Kennecott through its Filter Media Division and Dorr-Oliver, through its subsidiary, National Filter Media Corporation, are significant competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

13. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market enumerated in Paragraphs 7 and 8 of this Complaint in the following ways, among others:

(a) it will eliminate substantial actual competition between Kennecott and Dorr-Oliver in the relevant market;

(b) it will significantly increase the already high levels of concentration in the relevant market;

(c) it will further raise the barriers to entry that exist in the relevant market;

(d) customers of fabric air filter bags may be denied the benefits of free and open competition.

VII. VIOLATIONS CHARGED

14. The proposed acquisition set forth in Paragraph 7, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

15. The agreement described in Paragraph 7, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of the proposed acquisition of Dorr-Oliver Incorporated (hereinafter "Dorr-Oliver"), a wholly-owned subsidiary of Curtiss-Wright Corporation ("Curtiss-Wright"), by Kennecott Corporation (hereinafter "Kennecott"), and Kennecott having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Kennecott with violations of the Federal Trade Commission Act and the Clayton Act; and

Kennecott, its attorneys, and counsel for the Commission having

367-444 O - 82 - 50 : QL 3

thereafter executed an agreement containing a consent order, an admission by Kennecott of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Kennecott that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Kennecott has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Kennecott is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal executive offices at Ten Stamford Forum, High Ridge Park, Stamford, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Kennecott, and the proceeding is in the public interest.

Order

I.

It is ordered, That for the purposes of this order the following definitions shall apply:

1. *Kennecott* means Kennecott Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal offices at Ten Stamford Forum, Stamford, Connecticut, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of Kennecott's parents, divisions, subsidiaries, affiliates, successors, or assigns.

2. *Curtiss-Wright* means Curtiss-Wright Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal offices at One Passaic St., Wood-Ridge, New Jersey, as well as its officers, employees, agents, it parents, divisions, subsidiaries, affiliates, successors,

assigns, and the officers, employees or agents of Curtiss-Wright's parents, divisions, subsidiaries, affiliates, successors, or assigns.

3. *Dorr-Oliver* means Dorr-Oliver Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware and a wholly-owned subsidiary of Curtiss-Wright, with its principal offices at 77 Havemeyer Lane, Stamford, Connecticut, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of Dorr-Oliver's parents, divisions, subsidiaries, affiliates, successors, or assigns.

4. *Filter Media Division* or *FMD* means all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including, but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks, orders for purchase that are unfilled on the date of the divestiture, and all other property of whatever description presently owned or operated, together with all additions, replacements, and improvements hereafter made, by the Filter Media Division of the Kennecott Engineered Systems Company, a division of Kennecott Corporation.

5. *National Filter Media* or *NFM* means the National Filter Media Corporation, a subsidiary of Dorr-Oliver. It includes all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks, orders for purchase that are unfilled on the date of the divestiture, and all other property of whatever description presently owned or operated by NFM.

6. *Relevant products* means fabric air filter bags, wet filtration media, and cages.

a. The term *fabric air filter bag* means a tubular or non-tubular, seamed or seamless bag, varying in length, width, and material, which is used within air pollution control systems called *bag houses.*

b. The term *bag house* means a system used for the filtration of particulate matter from gas streams for environmental or safety reasons or for the recapture of valuable particulate.

c. The term *wet filtration media* means fabric filters of any shape used in industrial applications to separate liquids from solids.

d. The term *cages* means cylindrical wire mesh forms used in bag houses as a support for fabric air filter bags.

7. *Eligible Person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, other business or legal entity, or any combination thereof, approved by the Commission. Such approval shall be in the sole discretion of the Commission.

II.

It is ordered, That Kennecott shall divest absolutely and unqualifiedly FMD to an Eligible Person within nine months from the date of the issuance of this order.

III.

It is further ordered, That divestiture under Paragraph II shall be in a manner which preserves the assets and business divested as a viable competitor.

IV.

It is further ordered, That, pending the divestiture of FMD required by Paragraph II of this Order, Kennecott shall not take any action other than in the ordinary course of business, without the consent of the Federal Trade Commission, to diminish the value of FMD.

V.

It is further ordered, That pending divestiture under Paragraph II required by this order:

A. Kennecott shall operate NFM as a separately managed subsidiary, separately maintaining its own financial books and records, internal auditors, employees and management. Earnings and profits of NFM shall be retained by NFM and shall not be distributed to Kennecott or any third party as dividends or in any other form; *provided, however,* that ordinary dividends may be declared by NFM and that portion of dividends due the Filter Fabrics Company may be paid to the Filter Fabrics Company.

B. Kennecott: (1) shall exert no control over or influence on or interfere in any way in any of the business decisions or operations of NFM; (2) shall not cause NFM, directly or indirectly, to adopt policies preferred, suggested, or dictated by Kennecott; (3) shall not change NFM's existing policies or methods of operation. Furthermore, no Kennecott officer, director, employee, representative, or

agent shall serve in any NFM position and no Kennecott officer, director, employee, representative or agent shall serve on NFM's Board of Directors; *provided, however,* that Messrs. S. P. Felt, Jr., P. S. Felt, R. G. McElhanney, C. B. Scoble, G. Ehinger, and W. P. Holden may continue to serve on NFM's Board of Directors if they provide to the Commission an executed copy of the affidavit attached as Appendix I to this Order.

VI.

It is further ordered, That, for a period of ten years from the date of issuance of this order, Kennecott, its parents, divisions, subsidiaries, affiliates, successors, or assigns, shall not, directly or indirectly, acquire any stock, share capital, or equity interest in or assets used in the manufacture of any relevant product by, any concern, corporate or non-corporate, engaged in the manufacture or sale of any relevant product without the prior approval of the Federal Trade Commission.

VII.

It is further ordered, That Kennecott shall, within ninety days from the date of issuance of this order, and every ninety days thereafter until divestiture is completed, submit in writing to the Commission a report setting forth in detail the manner and form in which Kennecott intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons. After divestiture is completed, Kennecott shall submit in writing annual reports showing the manner and form of compliance with this order.

VIII.

It is further ordered, That for a period of ten years from the date of issuance of this order, Kennecott shall notify the Commission at least thirty days prior to any change in Kennecott which may affect compliance with the obligations arising out of this consent order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation.

APPENDIX I

AFFIDAVIT

STATE OF)
) ss:
CITY OF)

_____ being duly sworn, hereby deposes and says:

I, _____ affirm that I have read the Agreement Containing Consent Order to which this Sworn Statement is attached, and that pending divestiture of FMD as ordered in Paragraph II of that Agreement:

(1) I shall not cause NFM, directly or indirectly, to adopt policies or methods of operation preferred, suggested, or dictated by Kennecott and that Kennecott shall exert no control over or influence on or interfere in any way in, my consideration of any of the business decisions or operations of NFM;

(2) I will in no way, either directly or indirectly, participate in the business decisions or operations of FMD;

(3) I will make any reports on the business or operations of NFM to either Dorr-Oliver or Kennecott only in writing and will simultaneously forward a copy of each such report to the Commission.

_____

Sworn to before me this _____ day of _____ 1981.

_____

Notary Public

My Commission expires _____ .)

IN THE MATTER OF

COMMERCIAL CREDIT COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2420. Decision, June 26, 1973—Modifying Order, Sept. 29, 1981

This order reopens the proceeding and modifies the Commission's order issued on June 26, 1973 (38 F.R. 20229; 82 F.T.C. 1841) against one of the nation's largest finance companies by substituting for the order in its entirety, a modified order which deletes language requiring the company to obtain a "Personal Insurance Authorization" form from each borrower before the loan could be completed. For the next five years, the modified order requires the company to give borrowers who elect to purchase insurance a notice entitled "Your Right To Cancel Insurance," and give the customer the right to cancel credit insurance within 15 days of signing for a loan and receive a full refund of insurance funds.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Upon consideration of a request by respondent to reopen the proceeding and modify the Cease and Desist Order entered by consent against respondent in this matter on June 26, 1973, with the concurrence of the Divisions of Credit Practices and Compliance, and with the Director of the Bureau of Consumer Protection having recommended that the requested modifications of the Order be granted, the Commission has concluded on the basis of the foregoing that respondent's request should be granted,

It is therefore ordered, That this proceeding be reopened and that the following Modified Final Order be substituted and issued in lieu of the Order entered on June 26, 1973:

MODIFIED FINAL ORDER

I. *It is ordered,* That respondent Commercial Credit Company, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the granting of consumer loans subject to the provisions of Regulation Z, 12 C.F.R. 226.8 (1980), after April 1, 1982 12 C.F.R. 226.17 and 226.18 (1981), and the Truth in Lending Act, 15 U.S.C. 1601 *et seq.,* as amended, do forthwith cease and desist from:

1. Failing, when the charges for credit life insurance and/or

credit accident and health insurance are not included in the finance charge:

(a) To quote monthly payments, whether on the telephone, in person, or otherwise, which exclude the cost of credit life insurance and/or credit accident and health insurance.

(b) If monthly payments do reflect credit life insurance and/or credit accident and health insurance, such payments may be quoted only if the consumer is clearly told that:

(i) credit life insurance and/or credit accident and health insurance are optional; and

(ii) the consumer's choice regarding the insurance coverage will not be considered in respondent's approval of the consumer's credit.

2. Failing to include in the finance charge, charges for credit life insurance and/or credit accident and health insurance written in connection with the credit transaction unless:

(a) The insurance coverage is not required by the respondent and is not a factor in the approval by the respondent of the extension of credit and this fact is clearly and conspicuously disclosed in writing to the customer; and,

(b) Any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to the customer of the cost of such insurance, as required by 12 C.F.R. 226.4(a)(5) (1980) (12 C.F.R. 226.4(d) (1981) after April 1, 1982).

3. When the charges for credit life insurance and/or credit accident and health insurance are not included in the finance charge:

(a) Misrepresenting, orally or otherwise, directly or by implication, that credit life and/or credit accident and health insurance are required as a condition for obtaining credit from respondent.

(b) Discouraging, by misrepresentation, oral or otherwise, directly or by implication, the declination of credit life and/or credit accident and health insurance.

4. When the charges for credit life insurance and/or credit accident and health insurance are not included in the finance charge, failing:

(a) To grant each borrower who is covered by credit life and/or credit accident and health insurance a period of not less than fifteen

days in which to cancel such insurance and receive a full refund of insurance funds. Such cancellation period shall begin to run on the day that respondent delivers to the borrower the notice of "Cancellation Right" and "Cancellation Request" referred to in section (b) and (c) of this paragraph 4. A borrower's notification to respondent of cancellation of his or her insurance coverage shall be considered given on the date mailed or otherwise delivered to respondent.

(b) To deliver to each borrower who is covered by credit insurance a notice entitled "Your Right to Cancel Insurance." Such notice shall:

(i) be printed on paper of a color different from other loan documents;

(ii) be printed in print not smaller than the print of Attachment A hereto;

(iii) be substantially similar to the content of Attachment A hereto;

(iv) be the last document delivered to the borrower at the time of closing together with an acknowledgement of receipt which is specifically dated and separately signed by the borrower.

(c) To deliver to each borrower who is covered by credit insurance a borrower's copy of the "Cancellation Request" which contains only the contents of Attachment B hereto, and an envelope addressed to respondent.

(d) To mail or personally deliver to each borrower covered by credit insurance who orally inquires about cancellation, the notice of cancellation right described in section (b) and the envelope described in section (c).

(e) However, where the respondent receives a request for an extension of credit by mail, telephone, or written communication without personal solicitation, the provisions of this paragraph 4 shall not be applicable if the respondents' printed material delivered or made available to the customer clearly sets forth the disclosures required by 12 C.F.R. 226.4(a)(5) (1980) (12 C.F.R. 226.4(d) (1981) after April 1, 1982), and also sets forth the scheduled amount of payments both including the cost of credit and/or credit accident and health insurance and excluding the cost of credit and/or credit accident and health insurance, and which otherwise meets the requirements of 12 C.F.R. 226.8(g)(2) (1980) (12 C.F.R. 226.17(g) (1981) after April 1, 1982).

5. Failing to compute and disclose accurately the finance charge,

as required by 12 C.F.R. 226.4(a)(5) and 226.8(d) (1980) (12 C.F.R. 226.4(d) and 226.18(b) and (c) (1981) after April 1, 1982).

6. Failing to compute and disclose accurately the annual percentage rate to the nearest quarter of one percent as required by 12 C.F.R. 226.5(b) and 226.8(b) (1980) (12 C.F.R. 226.22 and 226.18 (1981) after April 1, 1982).

7. Failing, in any consumer loan transaction or advertisement to make all disclosures, determined in accordance with 12 C.F.R. 226.4 and 226.5 (1980) (12 C.F.R. 226.4 and 226.22 (1981) after April 1, 1982) in the manner, form and amount required by 12 C.F.R. 226.6, 226.8, 226.9, and 226.10 (1980) (12 C.F.R. 226.17, 226.18, 226.23, and 226.24 (1981) after April 1, 1982).

II. *It is further ordered,* That the respondent's obligations under the Order issued on June 26, 1973, shall remain effective and binding upon any of the consumer loan offices of respondent until such office is in compliance with paragraph 4 of this modified order, *provided, however,* that all of respondent's consumer loan offices shall be in compliance with paragraph 4 of this modified order not later than six months from the date of service of this modified order. Each of respondent's consumer loan offices shall be obligated to comply with paragraph 4 of this modified order only for the period of five years following immediately after the day on which the loan office is in compliance with such paragraph 4.

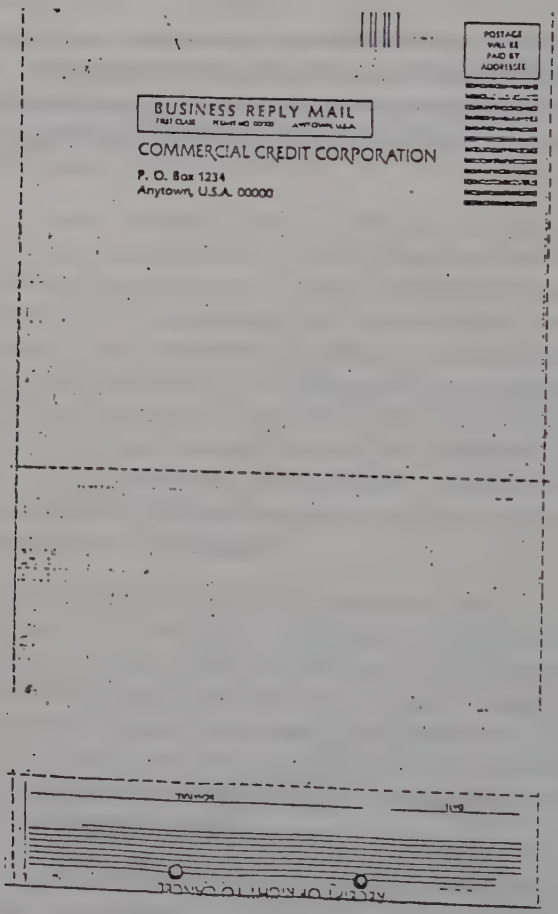
III. *It is further ordered,* That respondent shall maintain for a three year period, by individual consumer loan offices, records of the total number of borrowers and the names and addresses of each borrower who exercises his or her right to cancel credit insurance. At the request of the Commission staff, the respondent shall maintain records for an additional two-year period. The records required by this paragraph shall be available for inspection and copying by Commission staff upon request.

IV. *It is further ordered,* That respondent, shall not later than six months after the service of this Order upon it, deliver a copy of this Order to Cease and Desist to all present and future personnel of respondent at its general offices in Baltimore and in each of its subsidiary or other loan offices who are engaged in the extension of consumer loans.

V. *It is further ordered,* That respondent notify the Commission within thirty (30) days of any change in the corporate respondent which may affect compliance obligations with regard to the exten-

sion of consumer loans arising out of this Order, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation with regard to the extension of consumer loans which may affect compliance obligations arising out of this Order.

VI. *It is further ordered,* That respondent shall within two hundred ten (210) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.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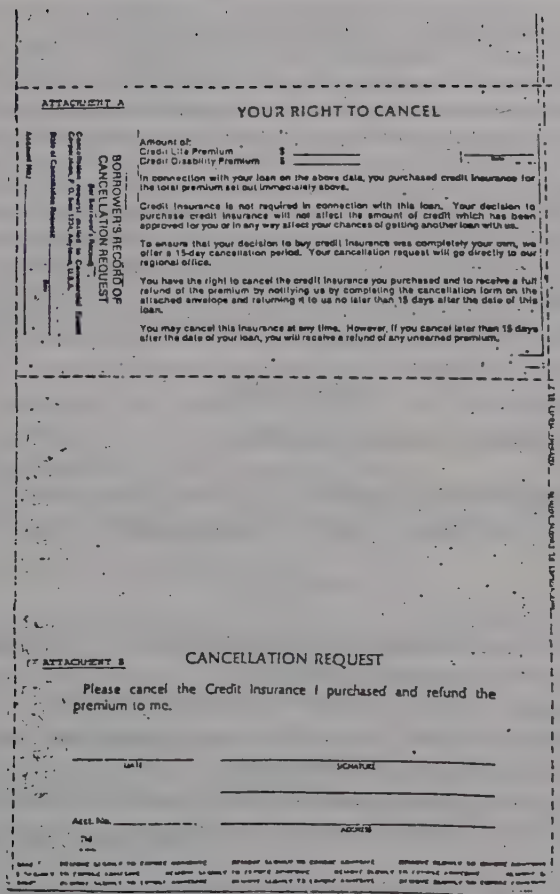


ATTACHMENT A

YOUR RIGHT TO CANCEL

Amount of:
Credit Life Premium $ _____
Credit Disability Premium $ _____

In connection with your loan on the above date, you purchased credit insurance for the total premium set out immediately above.

Credit insurance is not required in connection with this loan. Your decision to purchase credit insurance will not affect the amount of credit which has been approved for you or in any way affect your chances of getting another loan with us.

To ensure that your decision to buy credit insurance was completely your own, we offer a 15-day cancellation period. Your cancellation request will go directly to our regional office.

You have the right to cancel the credit insurance you purchased and to receive a full refund of the premium by notifying us by completing the cancellation form on the attached envelope and returning it to us no later than 15 days after the date of this loan.

You may cancel this insurance at any time. However, if you cancel later than 15 days after the date of your loan, you will receive a refund of any unearned premium.

BORROWER'S RECORD OF CANCELLATION REQUEST

ATTACHMENT B

CANCELLATION REQUEST

Please cancel the Credit Insurance I purchased and refund the premium to me.

DATE _____ SIGNATURE _____

Acct. No. _____ ADDRESS _____

IN THE MATTER OF

ALDENS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3076. Complaint, Oct. 8, 1981—Decision, Oct. 8, 1981

This consent order requires, among other things, a Chicago, Illinois mail order house to cease, in connection with the collection of debts, improperly contacting consumers or third parties. Except to advise consumers of legal remedies usually taken to collect debts, respondents are prohibited from communicating with consumers who have written the firm indicating that they will not pay the debt or wish no further contact regarding the debt. Additionally, for a five-year period, the order requires the insertion of a prescribed statement in all charge account agreements, which states that the company will limit discussions with third parties to information necessary to locate the consumer. The order also provides that should the Commission promulgate a trade regulation rule applicable to respondent's third party contacts, compliance with that rule will be considered part of the order.

Appearances

For the Commission: *Alan D. Reffkin.*

For the respondent: *Lawrence F. Henneberger* and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe Aldens, Inc., a corporation, hereinafter referred to as Aldens or respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Aldens, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and only place of business located at 5000 West Roosevelt Road, Chicago, Illinois.

PAR. 2. Respondent is now and for some time in the past has been regularly engaged in the sale of consumer products by catalog and direct mail merchandising to consumers residing throughout the United States. All orders, whether for cash or credit (extended by

respondent using its Aldens Charge Accounts), are solicited by mail through catalogs, flyers and other direct mail literature. For its fiscal year ending January 31, 1980, Aldens' sales were approximately $ 250 million, making it the nation's fifth largest mail order company.

PAR. 3. In the ordinary course and conduct of its business, Aldens, by its agents, representatives and employees, regularly engages in the collection of consumer debts allegedly owed to Aldens for the sale, on credit, of mail order consumer products as described in Paragraph Two. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course of attempting to collect the consumer debts referred to in Paragraph Three, herein, respondent, by means of the U.S. Postal Service, has transmitted and in certain instances continues to transmit to consumers and others not necessarily responsible for the financial affairs of said consumers, unsolicited forms, letters and notices demanding payment or requesting assistance or information to aid in the collection of said consumer debts. Copies of some of the forms used by Aldens are attached hereto as Exhibits 1 through 14.

Typical and illustrative, but not necessarily all inclusive, of the statements and representations made in said forms and printed materials are the following excerpts.*

1. Prior to accepting this for final settlement I am asking our Credit people to determine why you have failed to discharge your obligation.

A review of your history indicates:

you receive income from [employer].

bank affiliations with [bank].

you have credit with [merchant].

Additionally, [name of a credit-reference/friend/relative] may be in a position to help you. Of course, as we proceed we will update and uncover current conditions.

2. I have been instructed to place your seriously past due account locally for collection.

It is possible a local investigation will be made regarding your financial status, in order to determine the most expedient means of obtaining payment in full. Your

* Excerpt numbers correspond to the numbers of the exhibits from which they are extracted.

employer, both past and present, references, neighbors, local merchants and credit bureau may all be asked to report.

3. Your name was given to us as a personal reference or relative when we opened a Credit Account for [consumer's name].

The terms under which payments were to be made have not been kept. Despite numerous requests for settlement in a friendly manner, a serious past due condition still exists.

It is our desire to avoid the necessity of legal action in the local courts. That is why we are writing to you.

Perhaps a word from you will emphasize the gravity of this situation and result in payment . . .

4. The above named person has an account with us which is seriously past due . . .

Would you be interested in contacting this party regarding a loan for $ _____ , the total amount owed us?

If you find that you cannot grant this loan, but you can complete the following questionnaire, please do so and return it to us. We will gladly reimburse you for any investigative expense.

Verified address _____ Phone _____
Place of employment _____ Phone _____
Wife's place of employment _____
Phone _____
Neighbor or relative where customer might be contacted by phone _____

5. memo to:

n. g. hodges [Alden's Collection Dept. Employee]
[from: j. l. davis, Alden's Collection Dept. Supervisor]

Re: [Consumer's Name]

In reply to your memo stating that the above named person has ignored our efforts towards a friendly settlement, I recommend one of the following methods for enforcing payment.

1. Contact the debtor's employer to ask his assistance in obtaining payment in full . . .

A copy of this letter is being sent to the debtor to inform him of our intentions. If a full payment is not received within the next seven days, proceed with whatever action you consider the most appropriate and expedient.

6. The delivery of this letter at your place of employment indicates that you are gainfully employed, and can pay your just obligations.

Perhaps you don't realize the seriousness of your position . . .

We don't want to cause you unnecessary embarrassment. Nevertheless, action will be taken to collect the entire balance of $ _____through your employer unless you send a payment of $ _____ today.

7. Before authorizing an agent in your locality to act on our behalf, I intend to ask your employer for assistance in arranging payment of this long overdue account. I shall contact him in approximately 10 days.

An immediate payment of $ _____ will eliminate the necd for involving your employer in this matter, as well as the possibility of legal proceedings.

I advise you to act promptly, before it is too late.

8. May we ask your assistance in obtaining payment from your employee whose name appears above?

This person has not completed payments on merchandise purchased from us . . .

If you would be kind enough to speak to your employee about this obligation, I feel sure it would make him realize the seriousness of the situation and help bring about an amicable settlement.

If our customer no longer works for you, can you give us the name and address of his present employer?

9. I sincerely hope you didn't think we were trying to unload our problems on your shoulders when we asked you to speak to the above named person about his past due indebtedness to Aldens.

From our long experience in the credit field, we know that a few words from the employer usually result in the resumption of payments. Without your assistance, our only recourse will be to place the account with a local attorney. Since we don't want to take such drastic action if it can possibly be avoided, anything you can do to influence a friendly settlement will be greatly appreciated.

If this person no longer works for you, can you give us the name and address of his new employer?

10. From our previous communications with the Military Department, it is evident that they, too, desire to be cooperative and be of assistance to military personnel having financial difficulties. . .

Your reply and payment must be sent within the next seven (7) days. Otherwise, we will appeal to your Commanding Officer for assistance. Have you considered the consequences of such action? Notice of our intention is given so that you may avoid any unpleasantness or reflection on your record.

11. SEND $ _____ AT ONCE, UNLESS YOU RESPOND WE WILL CONTACT YOUR COMMANDING OFFICER. YOU OF COURSE REALIZE HE MAY ENFORCE THE PROVISIONS OF ARTICLE 133 OR 134 OF THE UNIFORM CODE OF MILITARY JUSTICE.

12. We are having a serious collection problem with the customer named above who we believe is under your command. When he opened his account in _____, 19___, he agreed to pay $ _____ per month. At present his account balance is $ _____ of which $ _____ is past due . . .

367-444 O - 82 - 51 : QL 3

A substantial amount of the items purchased may have been for the support of the serviceman's dependents.

We would greatly appreciate your discussing this matter with our customer, as we are confident that such a discussion would result in the resumption of regular payments.

Any information you can give us regarding this man's problem and his plan for payments will be helpful.

13. We are wondering . . . if you received our previous letter concerning the above named person who we believe is serving under your command.

Apparently he is experiencing financial difficulties since his Open End Credit Account has become considerably past due . . . as is evident by the data shown above.

Would you kindly arrange to have this matter called to his attention . . .

14. We regret very much . . . that it was necessary to contact your Commanding Officer about your past due account.

Since the Military Department encourages a serviceman to discharge his obligations satisfactorily, this matter will undoubtedly be brought to your attention by your superior officer . . .

As soon as this [payment] is received, at your request, we will notify your Commanding Officer of your agreement to settle this account.

If you fail to cooperate, we will have no choice but to further proceed through proper military channels.

PAR. 5. In the ordinary course and conduct of its business as aforesaid, respondent has transmitted and in some instances continues to transmit to consumers and third parties in a number of States thousands of copies of Exhibits 1–14 per month via the United States Postal Service. By and through the use of Exhibits 1, 2, 5, 6, 7, 10, 11, & 14, respondent threatened and in some instances continues to threaten consumers that it will contact third parties (including, but not limited to: friends, relatives, neighbors, commanding officers, employers and supervisors) in connection with its attempt to collect allegedly delinquent consumer debts. By and through the use of Exhibits 3, 4, 8, 9, 12, & 13, Aldens contacted and in some instances continues to contact such third parties. If no reply is received from the initial third party contact, a second contact may be attempted. (Respondent frequently made and continues to make third party contacts by means of the telephone, as well.) In the course of such practices, respondent frequently divulged and in some instances continues to divulge to third parties the fact, substance, and details of consumer's alleged indebtedness.

By and through the use of these acts and practices, respondent has in the past, and is in some instances presently, acting in an

oppressive or coercive manner, thereby unfairly threatening the jobs, reputations, emotional and mental security, and individual privacy of several thousands of consumers each month.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and have constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Chairman Miller did not participate.

[illegible] 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

May 9, 1970

Mr. Stanley, of our Credit Department has asked us to handle your seriously delinquent account as a "Collection" matter.

Prior to accepting this for final settlement I am asking our Credit people to determine why you have failed to discharge your obligation.

A review of your history indicates:

YOU RECEIVE INCOME FROM

BANK AFFILIATIONS WITH

YOU HAVE CREDIT WITH

Additionally, may be in a position to help you. Of course, as we proceed we will update and uncover current conditions.

In any event we will begin our pursuit unless payment and satisfactory arrangements are made. If you have sincere intentions of completing your agreement, act now prior to us absorbing the added expense of full collection of your defaulted agreement.

H. G. Hodges

H. G. HODGES
Collection Department

SCN:sr

EXHIBIT 1

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

[illegible] 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

May 16, 1978

Dear

I have been instructed to place your seriously past due account locally for collection.

It is possible a local investigation will be made regarding your financial status, in order to determine the most expedient means of obtaining payment in full. Your employer, both past and present, references, neighbors, local merchants and credit bureau may all be asked to report.

An investigation of this type followed by legal action in your local courts could seriously endanger your credit standing. You don't want this to happen - - and neither do we.

To prevent the drastic action outlined above, send the past due amount of $7.91 immediately.

M. G. Hodges

W. G. HODGES
Collection Department

WGH:fos

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 2

ALBERT'S 5300 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

July 18, 1972

RE:

Your name was given to us as a personal reference or relative when we opened a Credit Account for

The terms under which payments were to be made have not been kept. Despite numerous requests for settlement in a friendly manner, a serious past due condition still exists.

It is our desire to avoid the necessity of local action in the local courts. That is why we are writing to you.

Perhaps a word from you will emphasize the gravity of this situation and result in payment. Anything you can do certainly will be in this party's best interests. Your cooperation towards an amicable settlement will be appreciated.

Sincerely,

ALBERT, INC.

M. G. Hodges

M. G. Hodges
Collection Department

MGH:tpc

EXHIBIT 3

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

[illegible] [illegible] [illegible] [

June 23, 1978

MEMO TO:

W. G. HODGES

RE:

In reply to your memo stating that the above named person has ignored our efforts towards a friendly settlement, I recommend one of the following methods for enforcing payment.

1. Contact the debtor's employer to ask his assistance in obtaining payment in full.

2. Have a local investigation made to determine the extent of the debtor's assets preparatory to securing a judgment.

3. Retain a local attorney to file suit.

A copy of this letter is being sent to the debtor to inform him of our intentions. If a full payment is not received within the next seven days, proceed with whatever action you consider the most appropriate and expedient.

J. L. Davis

JLD:jl
CC:customer

J. L. DAVIS
Collection Department

FXHIBIT 5

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60637

189

The delivery of this letter at your place of employment indicates that you are gainfully employed, and can pay your just obligations.

Perhaps you don't realize the seriousness of your position. Your signed agreement with Aldens is legally binding. Despite this agreement, you have used our merchandise without completing your payments.

We don't want to cause you unnecessary embarrassment. Nevertheless, action will be taken to collect the entire balance of $327.16 through your employer unless you send a payment of $80.00 TODAY.

Sincerely,

ALDENS, INC

W. G. Hodges

W. G. HODGES
Collection Department

WGH:chn

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 6

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60707

It is becoming more apparent that it will be necessary to enforce payment of the money you owe Aldens through the means available to us in Illinois.

Before authorizing an agent in your locality to act on our behalf, I intend to ask your employer for assistance in arranging payment of this long overdue account. I shall contact him in approximately 10 days.

An immediate payment of $ will eliminate the need for involving your employer in this matter, as well as the possibility of legal proceedings.

I advise you to act promptly, before it is too late.

Sincerely,

ALDENS, INC.

J. L. DAVIS
Collection Department

JLD:dl

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

May we ask your assistance in obtaining payment from your employee whose name appears above?

This person has not completed payments on merchandise purchased from us, even though we have offered the most lenient terms possible. We realize many people are hard pressed at times, and hesitate to discuss their problems. However, if we knew what was wrong, we would gladly cooperate.

If you would be kind enough to speak to your employee about this obligation, I feel sure it would make him realize the seriousness of the situation and help bring about an amicable settlement.

If our customer no longer works for you, can you give us the name and address of his present employer? We will be very grateful for any assistance you are able to give us.

Sincerely,

ALDENS, INC.

N. G. Hodges

NGH:eapa
ENC:hte

N. G. HODGES
Collection Department

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 8

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60644

I sincerely hope you didn't think we were trying to unload our problems on your shoulders when we asked you to speak to the above named person about his past due indebtedness to Aldens.

From our long experience in the credit field, we know that a few words from the employer usually result in the resumption of payments. Without your assistance, our only recourse will be to place the account with a local attorney. Since we don't want to take such drastic action if it can possibly be avoided, anything you can do to influence a friendly settlement will be greatly appreciated.

If this person no longer works for you, can you give us the name and address of his new employer? Thank you very much for your cooperation.

Sincerely,

ALDENS, INC.

M. G. Hodges

MGH:espb
ENC:hre

M. G. HODGES
Collection Department

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 3

500 West Superior Road / Chicago Illinois 6

July 18, 1972

Dear Sgt. :

Let's be frank with each other. We've written you many times, but for some reason, unknown to us, no answer or payment has been received.

We are not hard to get along with, and we are inclined to be helpful . . and not unreasonable. However, since you have remained silent to our request for payment, this causes us not only to misjudge you, but it is also defeating our sincere efforts to help you.

From our previous communications with the Military Department; it is evident that they, too, desire to be cooperative and be of assistance to military personnel having financial difficulties.

We are willing to help every way we can . . within reason. But, we must have a definite understanding as to exactly what you are going to do, and not continue this present uncertainty.

Your reply and payment must be sent within the next seven (7) days. Otherwise, we will appeal to your Commanding Officer for assistance. Have you considered the consequences of such action? Notice of our intention is given so that you may avoid any unpleasantness or reflection on your record.

We await your payment and response.

W. G. Hodges

W. G. HODGES
Collection Department

WGH:bco

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 10

ALBENS, INC.

COLLECTION DEPARTMENT MESSAGE

CODE AG-7	URGENT MESSAGE TO DELINQUENT DEBTOR	DATE 7/18/72

SEND $80.00 AT ONCE. UNLESS YOU RESPOND WE WILL CONTACT YOUR COMMANDING OFFICER. YOU OF COURSE REALIZE WE MAY ENFORCE THE PROVISIONS OF ARTICLE 133 OR 134 OF THE UNIFORM CODE OF MILITARY JUSTICE.

SENDER'S NAME	[illegible]	[illegible]	312
CLAIM NUMBER	[illegible]	[illegible]	[illegible] CHICAGO

EXHIBIT 11

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

January 20, 1977

COMMANDING OFFICER

RE:

We are having a serious collection problem with the customer named above who we believe is under your command. When he opened his account in July, 1976, he agreed to pay $15.00 per month. At present, his account balance is $395.53, of which $93.00 is past due.

Our agreement covering this obligation requires the debtor to make regular monthly payments. A substantial amount of the items purchased may have been for the support of the serviceman's dependents.

We would greatly appreciate your discussing this matter with our customer, as we are confident that such a discussion would result in the resumption of regular payments.

We realize that anyone can experience financial difficulties, but if this man will cooperate with us, he may be sure we will be reasonable in dealing with him.

Any information you can give us regarding this man's problem and his plan for payments will be helpful. In your reply please refer to case differentiation. The required Certificate of Compliance is enclosed.

W. G. Hodges

WGH:mco
Encl:cert.,brm

W. G. HODGES
Collection Department

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 12

ALBERTS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

January 20, 1977

COMMANDING OFFICER

Balance $200.66
Monthly
Payment $10.00
Past Due $80.00

RE:

We are wondering . . . if you received our previous letter concerning the above named person who we believe is serving under your command.

Apparently he is experiencing financial difficulties since his Open End Credit Account has become considerably past due . . as is evident by the data shown above.

We will be most happy to cooperate in working out some arrangement whereby he can discharge his obligation. All he has to do is to write and tell us how we can help him. Perhaps a payment and plan for repaying would be a good way to start this man on the way to re-establish his credit.

Would you kindly arrange to have this matter called to his attention giving him our assurance that we wish to cooperate in every way. Or . . if you should have any suggestions, we would be very glad to cooperate in any manner you might suggest.

Thank you for your kind attention to this letter.

When replying please refer to our file ARSHIE:APCMY1.

N. G. Hodges

NGH:acf
ENC:bto

N. G. HODGES
Collection Department

EXHIBIT

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

July 18, 1972

We regret very much . . that it was necessary to contact your Commanding Officer about your past due account.

Since the Military Department encourages a serviceman to discharge his obligations satisfactorily, this matter will undoubtedly be brought to your attention by your superior officer.

It was . . . and is . . . our intention to help you in whatever way we can. Send $20.00 within five (5) days along with your assurance to continue payments on any reasonable terms you choose. As soon as this is received, at your request, we will notify your Commanding Officer of your agreement to settle this account.

If you fail to cooperate, we will have no choice but to further proceed through proper military channels. We sincerely hope that we may hear favorably from you in reply to this letter.

W. G. Hodges

W. G. HODGES
Collection Department

WGH:afco

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 14

Decision and Order

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Aldens, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 5000 West Roosevelt Road, in the City of Chicago, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

DEFINITION: For the purposes of this Order, the term *consumer* shall mean any natural person obligated or allegedly obligated to pay any debt.

I

It is ordered, That respondent, Aldens, Inc., a corporation, its

successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection or attempted collection of any consumer debt, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

(1) Communicating with any consumer without the prior consent of the consumer given directly to respondent at the time of the attempt to collect any debt, or the express permission of a court of competent jurisdiction if:

(a) Such communication is at any unusual time or place, or a time or place known (or which should be known) by respondent to be inconvenient to the consumer, including the consumer's place of employment, if respondent knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication; or

(b) Respondent knows the consumer is represented by an attorney acting on behalf of and in the name of the consumer with respect to such debt, and has knowledge of or can readily ascertain such attorney's name and address; *provided, however,* that respondent is permitted to communicate directly with the consumer if the attorney fails to respond, within a reasonable period of time, to a communication from respondent, or the attorney consents to direct communication with the consumer.

(2) Communicating with any consumer if the consumer has notified respondent in writing that he or she refuses to pay the debt, or wishes respondent to cease further communication, except:

(a) as reasonably necessary to inform the consumer that respondent may invoke specified remedies which are ordinarily invoked by respondent; or

(b) to advise the consumer that respondent will cease further communication.

(3) Failing to comply with the terms of the following statement which shall appear as a contract provision in all of respondent's charge account agreements for a period of five (5) years, beginning no later than six (6) months after this Order becomes final:

In the course of collecting or attempting to collect any debt arising from this charge agreement, Aldens will not discuss or threaten to discuss my debt with any person other than me or my attorney, without my written consent (given at the time of the attempt to collect) unless permitted by a court. However, Aldens may contact other

persons without mentioning any debt, if that is necessary to locate me. This provision does not limit Aldens' right to contact its attorneys or debt collection and credit reporting agencies, when permitted by law.

(a) This provision shall be printed clearly and conspicuously in the same size type as are the other provisions of the agreement.
(b) The term "collecting or attempting to collect any debt," as used in the above statement, shall not include contacts by respondent:

(1) with a credit reporting agency for the purpose of reporting or obtaining information;
(2) with a debt collection agency engaged or being engaged to collect the debt in question;
(3) with any person with the written consent of the consumer, given at the time of the attempt to collect;
(4) with its own attorneys;
(5) with third persons for the purpose of acquiring location information as provided in paragraph 3(c) of this Order; or
(6) which are reasonably necessary to effectuate a post-judgment judicial remedy.

(c) When contacting third persons to determine the location of the consumer, respondent shall:

(1) request information only as to the consumer's home address, home phone number, and place of employment;
(2) identify itself and state the purpose of the contact (i.e., Aldens is trying to locate the consumer) without stating that the consumer owes any debt; and
(3) not communicate more than once with any such person, unless it is reasonably believed to be necessary.

(d) Upon the expiration of the five (5) year period provided for in Paragraph (3) of this Order, respondent shall continue to comply with the terms of the statement contained in that paragraph.

II

It is further ordered, That:

(4) In the event that the Federal Trade Commission promulgates a valid trade regulation rule applicable to respondent's third party contact activities, then compliance with that rule shall be deemed compliance with Paragraph (3) of this Order.
(5) Respondent shall deliver a copy of this Order to cease and

desist to all present and future personnel of its collection staff who are engaged in the preparation or use of materials and procedures to be used in connection with the training of personnel or the actual day-to-day operation of respondent's collection activities, and shall secure a signed statement acknowledging receipt of said Order from each such person.

(6) Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the Order.

(7) Respondent shall, within sixty (60) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Chairman Miller did not participate.

IN THE MATTER OF

COOGA MOOGA, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2925. Order, Aug. 9, 1978—Modifying Order, Oct. 15, 1981

In response to the Commission's adoption of the material connection Endorsement Guide, this order reopens the proceeding and modifies the Commission's order issued on August 9, 1978 (43 FR 40804, 92 F.T.C. 310) by deleting the words "any financial interest in the sale of the product or service which is the subject of the endorsement or" from the definition of material connection contained in Paragraph I.D. This modification relieves the petitioners of the obligation of disclosing any financial interest they may have in the sale of an endorsed product.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Charles E. "Pat" Boone and Cooga Mooga, Inc., (hereinafter "Petitioners") have filed, pursuant to Rule 2.51 of the Commission's Rules of Practice, a Petition to Reopen, Modify, Alter or Set Aside Parts of Consent Order (hereinafter "Petition"). The Petition seeks the modification or elimination of two provisions of the Commission's Order of August 9, 1978. The Order concerns petitioners' representations as advertisers and as endorsers, and requires them to contribute a pro rata share to a restitution program for purchasers of Acne-Statin, a product endorsed by petitioners.

The first issue raised by the Petition concerns the "material connection" disclosure provision of Paragraph I.D. of the Order. This provision requires petitioners, when they act as endorsers, to disclose "any financial interest in the sale of the product or service which is the subject of the endorsement or any familial connection between the endorser and the advertiser or its advertising agency." Petitioners argue that this provision unfairly discriminates against them because no other celebrity endorser is required to disclose such interest. Petitioners further contend that the Order provision conflicts with the Commission's "Guides Concerning Use of Endorsements and Testimonials in Advertising." 16 C.F.R. Part 255 (1980). In addition, they maintain that the material connection disclosure requirement is harmful to small business and infringes petitioners' First Amendment rights.

The Petition does not present any evidence of changed circumstances regarding the familial connection portion of the material

connection definition, nor is there any indication that the modification of this language would be in the public interest. The Commission therefore declines to set aside or alter the requirement that petitioners disclose familial connections with the advertiser or its advertising agency.

The financial interest portion of the material connection definition requires petitioners to disclose any interest in the sale of the endorsed product. This covers situations in which the compensation received by petitioners for the endorsement is related to the volume of sales of the product, i.e., a "share of the action." The Order does not require petitioners to disclose remuneration if it is in the form of a fixed sum in advance of the endorsement, or if it is based upon the extent of the dissemination of the advertisement.

On January 16, 1980, the Commission promulgated its Endorsement Guides. Guide 5, regarding the disclosure of material connections between advertisers and endorsers, provides:

> When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit such as an appearance on TV, would be extended to the endorser.

The Commission has determined that under this Guide, advertisers are not required to disclose that celebrity endorsers are compensated for endorsements, regardless of the method of compensation. This is because the Commission believes that the manner in which celebrities are compensated does not materially affect the weight or credibility of an endorsement. The Commission further finds that the adoption of the material connection Endorsement Guide constitutes a change in the law regarding the obligation of celebrity endorsers to disclose their financial interest in the sale of the advertised product. The Commission therefore concludes that petitioners have made a satisfactory showing, as required by Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45, that the section of the definition of material connection pertaining to petitioners' financial interest in the sale of the advertised product should be deleted from the Order.

Petitioners also seek relief from their obligation under the Order

to contribute a pro rata share to the restitution program for purchasers of Acne-Statin. This claim is based on the alleged disparity in the Commission's treatment of petitioners versus other endorsers subject to Commission Orders. The two other Orders cited by petitioners are those against Gordon Cooper and against Harvey Glass, M.D. (C–3004). The factual circumstances of these cases differed substantially, however, from those involved in the instant case; the cases involve disparities in *inter alia,* the volume of sales of the endorsed product and the remuneration received by the endorser. These differences amply justify the differential remedies selected in each case. The *Cooper* and *Glass* Orders do not, therefore, constitute a change in law. Nor do any changes in fact or the public interest warrant the alteration or elimination of petitioners' restitution obligations.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on August 9, 1978, in Docket No. C–2925 is hereby modified by deleting from the definition of material connection contained in Order Paragraph I.D. the words, "any financial interest in the sale of the product or service which is the subject of the endorsement or." Petitioners' request for the modification of Paragraph II of the Order is hereby denied.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

IN THE MATTER OF

GREAT NORTH AMERICAN INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3077. Complaint, Oct. 29, 1981—Decision, Oct. 29, 1981

This consent order requires, among other things, two Gainesville, Texas corporations and a corporate officer to cease representing that substantial fuel economy can be achieved by the use of Teflon oil additives such as "Tephguard." Further, respondents are prohibited from making representations that the use of any automobile retrofit device, fuel or engine oil additive will increase fuel economy, unless substantiated by competent scientific evidence, and accompanied by the disclosure of any limitations on the performance or efficacy of such products. Additionally, the Order bars claims of government approval without written and dated authorization; prohibits misrepresentations concerning the conclusions of product tests or surveys; and requires that consumer endorsements of any product or service reflect typical consumer experiences.

Appearances

For the Commission: *Laurence M. Kahn* and *William Haynes.*

For the respondent: *Jack Paller, Katz, Paller & Land,* Atlanta, Ga., *Marshall Dooley,* Dallas, Tex., and *Donald Higgenbotham,* Austin, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Great North American Industries, Inc., a corporation, Products on the Move, Inc., a corporation, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., hereinafter sometimes referred to as "respondents," have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Great North American Industries, Inc., and Products on the Move, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the

State of Texas with their office and principal place of business located at 104 West Main St., Gainesville, Texas.

Respondent Patrick O. McCrary is President of the corporate respondents Great North American Industries, Inc., and Products on the Move, Inc. He formulates, directs, and controls the acts and practices of all said corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now and for sometime last past have been engaged in the advertising, offering for sale, sale, and distribution of a product known as Tephguard (Tefguard), hereinafter sometimes referred to as "product," which product is advertised as a means of improving fuel economy in automobiles. Said product is an automobile engine oil additive. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional materials for the purpose of promoting the sale of said product.

PAR. 3. In the course and conduct of their said business, the respondents have disseminated and caused the dissemination of certain advertisements for said product through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations; and have disseminated and caused the dissemination of advertisements for said product by various means, including, but not limited to, the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated by respondents are the materials identified as Exhibits A and B which are attached hereto.

PAR. 5. Through the use of the advertisements referred to in Paragraph Four, and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. Tephguard when used in a typical automobile engine will substantially improve fuel economy;

b. under normal conditions, a typical driver can ordinarily obtain

a fuel economy improvement which will approximate or equal twenty-six percent when Tephguard is used in his/her automobile;

c. competent scientific tests have proven the fuel economy claims made for Tephguard;

d. results of consumer usage, as evidenced by consumer endorsements, prove that Tephguard substantially improves fuel economy;

e. the Environmental Protection Agency (E.P.A.) has approved the use of Tephguard in automobiles to improve fuel economy;

f. the consumer endorsements which appear in advertisements and sales promotional materials for Tephguard reflect the typical or ordinary experience of members of the public who have used Tephguard.

PAR. 6. In truth and in fact, contrary to respondent's representations set forth in Paragraph Five:

a. Tephguard when used in a typical automobile will not substantially improve fuel economy;

b. under normal driving conditions, a typical driver cannot ordinarily obtain a fuel economy improvement which will approximate or equal twenty-six percent when Tephguard is used in his/her automobile;

c. no competent scientific tests have proven the fuel economy claims for Tephguard;

d. results of consumer usage, as evidenced by consumer endorsements, do not prove that Tephguard substantially improves fuel economy;

e. the Environmental Protection Agency (E.P.A.) has not approved the use of Tephguard in automobiles to improve fuel economy;

f. the consumer endorsements which appear in advertisements and sales promotional materials for Tephguard do not reflect the typical or ordinary experience of members of the public who have used Tephguard.

Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 7. At the time respondents made the representations alleged in Paragraph Five of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 8. The advertisements referred to in Paragraph Four and other advertisements and sales promotional materials represent,

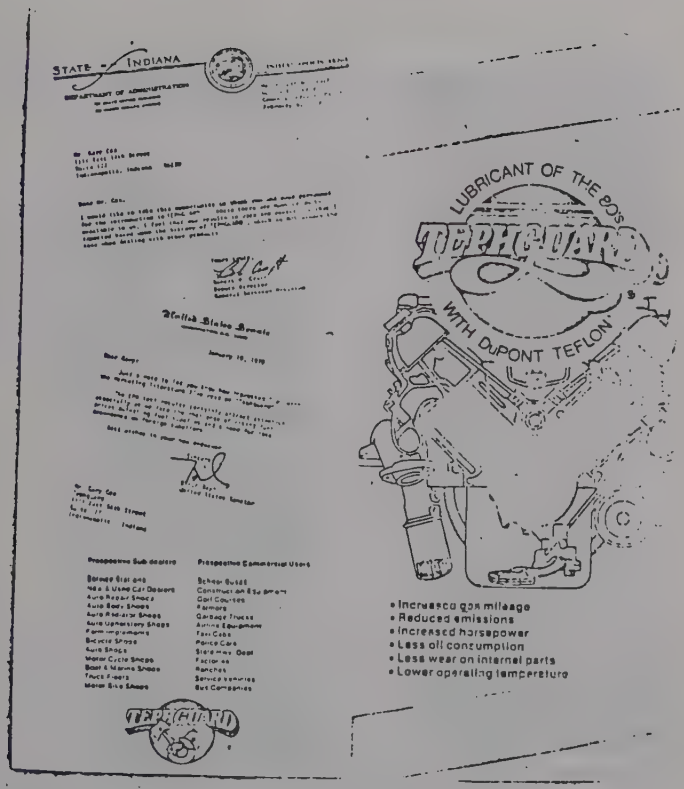
directly or by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Five. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

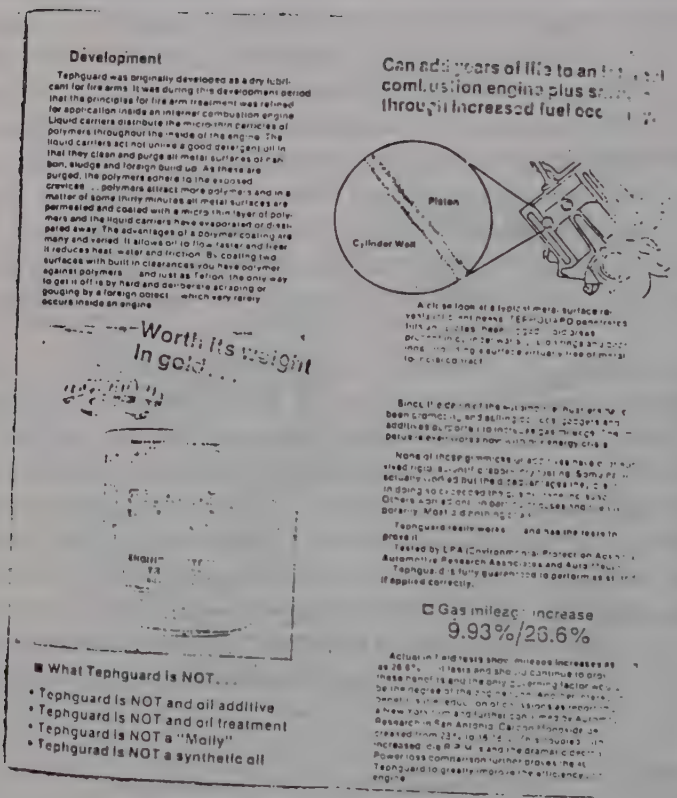
PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of engine oil additives, gasoline additives, and automobile retrofit devices.

PAR. 10. The use by respondents of the aforesaid unfair or deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 11. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public, and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Chairman Miller did not participate.


STATE OF INDIANA
LUBRICANT OF THE 80's
WITH DUPONT TEFLON
• Increased gas mileage
• Reduced emissions
• Increased horsepower
• Less oil consumption
• Less wear on internal parts
• Lower operating temperature



Development

Tephguard was originally developed as a dry lubricant for fire arms. It was during this development period that the principles for fire arm treatment was refined for application inside an internal combustion engine. Liquid carriers distribute the micro-thin particles of polymers throughout the inside of the engine. The liquid carriers act not unlike a good detergent oil in that they clean and purge all metal surfaces of carbon, sludge and foreign build up. As these are purged, the polymers adhere to the exposed crevices . . . polymers attract more polymers and in a matter of some thirty minutes all metal surfaces are permeated and coated with a micro thin layer of polymers and the liquid carriers have evaporated or dissipated away. The advantages of a polymer coating are many and varied. It allows oil to flow faster and freer. It reduces heat, wear and friction. By coating two surfaces with built in clearances you have polymer against polymers . . . and rust as Teflon, the only way to get it off is by hard and deliberate scraping or gouging by a foreign object . . . which very rarely occurs inside an engine.

Can add years of life to an [illegible] combustion engine plus s[illegible] through increased fuel eco[illegible]

Piston

Cylinder Wall

Worth its weight in gold . . .

■ What Tephguard is NOT . . .

- Tephguard is NOT and oil additive
- Tephguard is NOT and oil treatment
- Tephguard is NOT a "Molly"
- Tephgurad is NOT a synthetic oil

Since it's discovery the lubricating properties of Teflon have been tremendously enhanced by utilizing [illegible] additives to form a [illegible] Teflon's extraordinary non-wetting characteristics.

None of these greases or oils [illegible] Tephguard's unique rigid bonded polymer coating. Simply put, actually bonded but the molecular [illegible] in doing so [illegible] Others coat [illegible] porosity. Most disappear.

Tephguard really works . . . and has the tests to prove it.

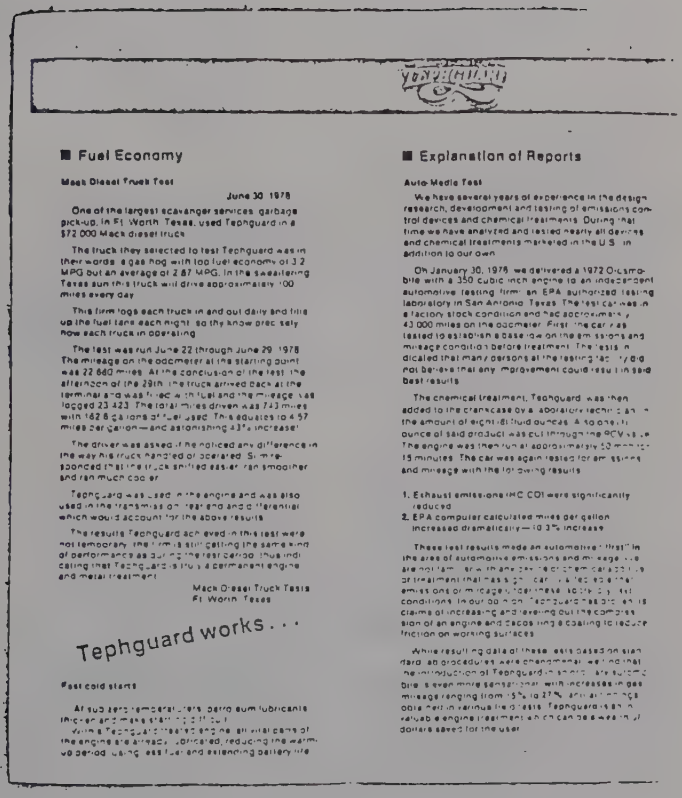
Tested by EPA (Environmental Protection Agency), Automotive Research Associates and Auto Research.

Tephguard is fully guaranteed to perform as stated if applied correctly.

□ Gas mileage increase

9.93%/26.6%

Actual road tests show mileage increases as [illegible] as 26.6%. [illegible] and should continue to [illegible] these range is due to the driving factor which [illegible] the degree of the increase. Another major benefit is the reduction of [illegible] as recognized by the New York Air Pollution Control Commission and Automotive Research in San Antonio, California. [illegible] created from 23% to 18% [illegible] increased [illegible] and the dramatic decrease in [illegible] Dynamometer tests conducted by Powerloss Corporation further proves that Tephguard [illegible] greatly improves the efficiency of the engine.



■ Fuel Economy

Mack Diesel Truck Test

June 30 1978

One of the largest scavenger services garbage pick-up in Ft Worth Texas used Tephguard in a $72 000 Mack diesel truck

The truck they selected to test Tephguard was in their words a gas hog with too fuel economy of 3 2 MPG but an average of 2 87 MPG. In the sweltering Texas sun this truck will drive approximately 100 miles every day

This firm logs each truck in and out daily and fills up the fuel tank each night so they know precisely how each truck is operating

The test was run June 22 through June 29 1978 The mileage on the odometer at the starting point was 22 660 miles At the conclusion of the test the afternoon of the 29th the truck arrived back at the terminal and was filled with fuel and the mileage was logged 23 423 The total miles driven was 763 miles with 162 8 gallons of fuel used This equates to 4 57 miles per gallon—and astonishing 43% increase!

The driver was asked if he noticed any difference in the way his truck handled or operated Simply responded that the truck shifted easier ran smoother and ran much cooler

Tephguard was used in the engine and was also used in the transmission rear end and differential which would account for the above results

The results Tephguard achieved in this test were not temporary the truck is still getting the same kind of performance as during the test period thus indicating that Tephguard is truly a permanent engine and metal treatment

Mack Diesel Truck Tests
Ft Worth Texas

Tephguard works . . .

Fast cold starts

At sub zero temperatures petro sum lubricants thicken and make starting difficult

With a Tephguard treated engine all vital parts of the engine are already lubricated reducing the warm up period using less fuel and extending battery life

■ Explanation of Reports

Auto Medic Test

We have several years of experience in the design research development and testing of emissions control devices and chemical treatments During that time we have analyzed and tested nearly all devices and chemical treatments marketed in the U S in addition to our own

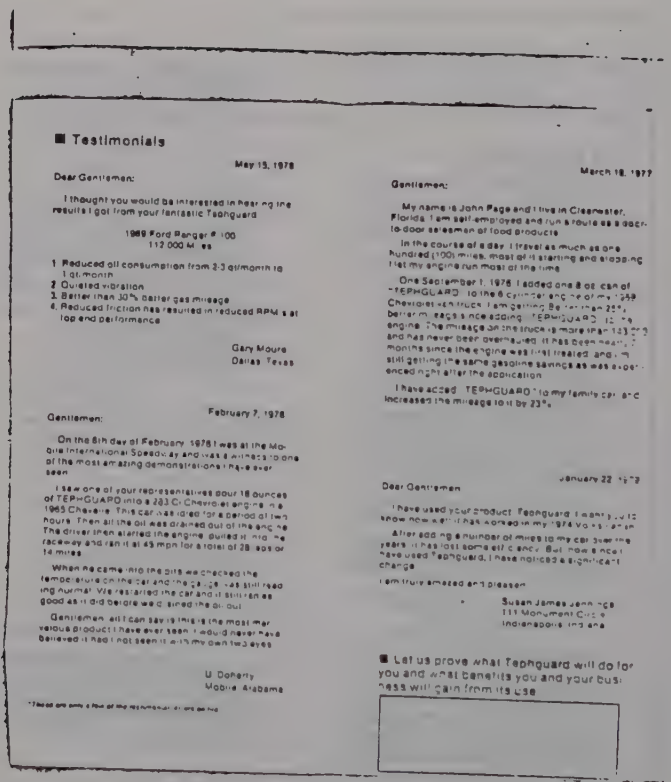
On January 30 1976 we delivered a 1972 Oldsmobile with a 350 cubic inch engine to an independent automotive testing firm an EPA authorized testing laboratory in San Antonio Texas The test car was in a factory stock condition and had approximately 43 000 miles on the odometer First the car was tested to establish a baseline on the emissions and mileage condition before treatment The tests indicated that many persons at the testing facility did not believe that any improvement could result in said best results

The chemical treatment Tephguard was then added to the crankcase by a laboratory technician in the amount of eight fluid ounces A two fluid ounce of said product was put through the PCV valve The engine was then run at approximately 50 miles for 15 minutes The car was again tested for emissions and mileage with the following results

1. Exhaust emissions (HC CO) were significantly reduced
2. EPA computer calculated miles per gallon increased dramatically—10 3% increase

These test results made an automotive first in the area of automotive emissions and mileage as are not claims or theories but rather actual results of treatment that has put cars vehicles and their emissions on mileage under test conditions In our opinion Tephguard has substantiated its claims of increasing and leveling out the compression of an engine and decreasing and sealing to reduce friction on working surfaces

While results of these tests based on standard procedures were phenomenal we found that the introduction of Tephguard in specific automotive systems with increases in gas mileage ranging from 15% to 37% and emissions obtained in various test results Tephguard is an invaluable engine treatment which can be worth its dollars saved for the user



■ Testimonials

May 15, 1978

Dear Gentlemen:

I thought you would be interested in hearing the results I got from your fantastic Teahguard.

1969 Ford Ranger F-100
112,000 Miles

1. Reduced oil consumption from 2-3 qt/month to 1 qt./month
2. Quieted vibration
3. Better than 30% better gas mileage
4. Reduced friction has resulted in reduced RPM's at top end performance

Gary Moore
Dallas, Texas

February 7, 1978

Gentlemen:

On the 6th day of February 1978 I was at the Mobile International Speedway and was a witness to one of the most amazing demonstrations I have ever seen.

I saw one of your representatives pour 16 ounces of TEPHGUARD into a 283 C.I. Chevrolet engine in a 1965 Chevelle. This car was raced for a period of ten hours. Then all the oil was drained out of the engine. The driver then started the engine, pulled it into the raceway and ran it at 45 mph for a total of 28 seconds or 14 miles.

When he came into the pits we checked the temperature on the car and the gauge was still reading normal. We restarted the car and it still ran as good as it did before we drained the oil out.

Gentlemen, all I can say is this is the most marvelous product I have ever seen. I would never have believed it had I not seen it with my own two eyes.

U. Doherty
Mobile, Alabama

*These are only a few of the testimonials we have.

March 18, 1977

Gentlemen:

My name is John Page and I live in Clearwater, Florida. I am self-employed and run a route as a door-to-door salesman of food products.

In the course of a day I travel as much as one hundred (100) miles, most of it starting and stopping that my engine run most of the time.

One September 1, 1976 I added one 8 oz can of TEPHGUARD to the 6 cylinder engine of my 1969 Chevrolet ½ ton truck. I am getting 8 to 10 mpg 25% better mileage since adding TEPHGUARD to the engine. The mileage on the truck is more than 123,000 and has never been overhauled. It has been nearly 7 months since the engine was first treated and I'm still getting the same gasoline savings as was experienced right after the application.

I have added TEPHGUARD to my family car and increased the mileage to it by 23%.

January 22, 1978

Dear Gentlemen:

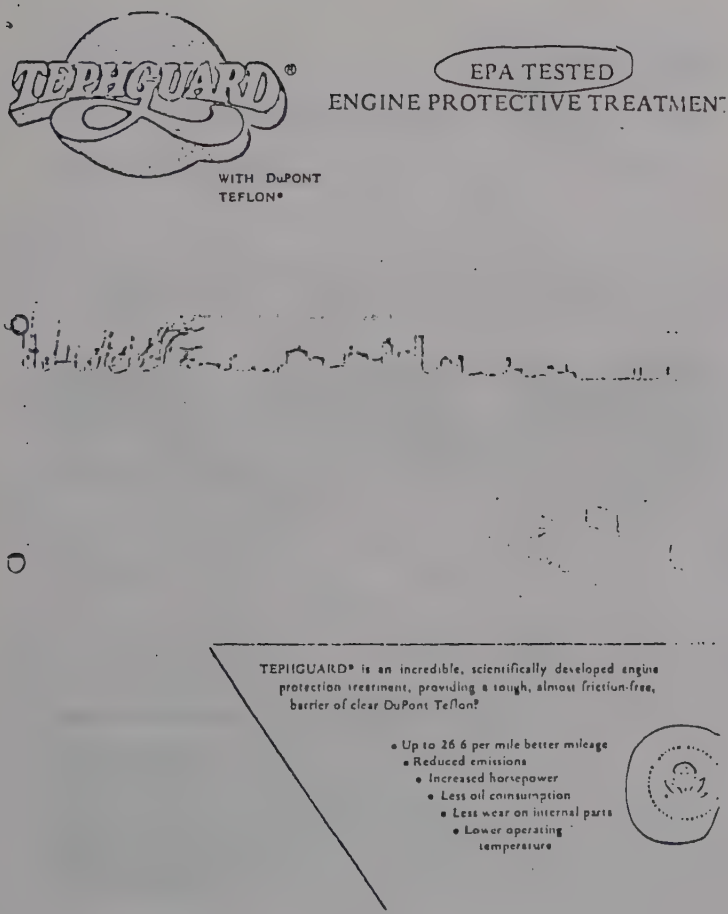
I have used your product Tephguard. I want you to know how well it has worked in my 1974 Volkswagen.

After adding a number of miles to my car over the years it has lost some of its energy. But now since I have used Tephguard, I have noticed a significant change.

I am truly amazed and pleased.

Susan James Services
111 Monument Circle
Indianapolis, Indiana

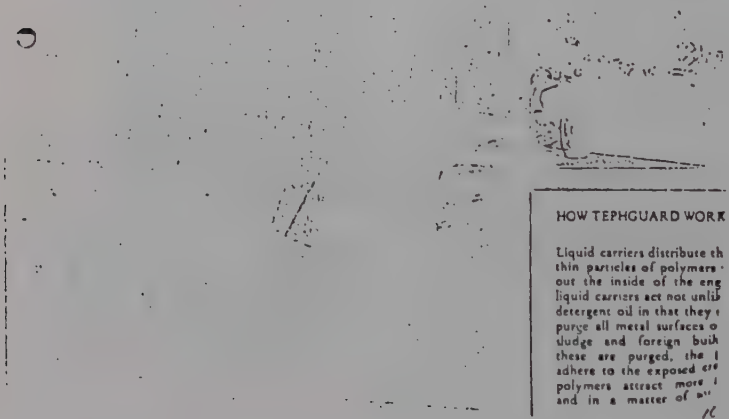
■ Let us prove what Tephguard will do for you and what benefits you and your business will gain from its use.


TEPIGUARD®
WITH DuPONT TEFLON®
EPA TESTED
ENGINE PROTECTIVE TREATMENT
TEPIGUARD® is an incredible, scientifically developed engine protection treatment, providing a tough, almost friction-free, barrier of clear DuPont Teflon®
• Up to 26.6 per mile better mileage
• Reduced emissions
• Increased horsepower
• Less oil consumption
• Less wear on internal parts
• Lower operating temperature

HERE IS WHAT OTHERS HAVE SAID:

— Diesel Engineer
"Just a note to let you know Tephguard® really works. As you know, I keep weekly mileage and gasoline records and thought that I would pass the following on to you. The three weeks prior to putting Tephguard in my car, I drove 1,994 miles, used 176.6 gallons of gas for an average of 11.291 m. p. g. The three weeks following application, I drove 1,603 miles, used 104.2 gallons for an average of 15.383 m. p. g. That is an almost unbelievable increase of 26.6%! You've got a true believer!"

— Police Chief
"On January 1, 1976, approximately eight ounces of Tephguard added to a vehicle in our fleet was experiencing high oil consumption. On a monthly average, the was consuming approximatel quarts of oil.
After adding Tephguard to



HOW TEPHGUARD WORK

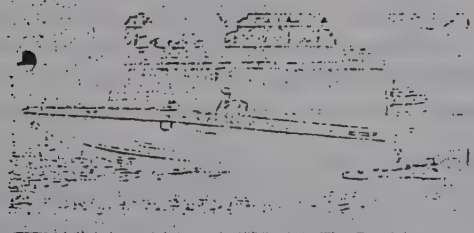
Liquid carriers distribute th thin particles of polymers · out the inside of the eng liquid carriers act not unlik detergent oil in that they r purge all metal surfaces o sludge and foreign built these are purged, the l adhere to the exposed sur polymers attract more l and in a matter of a

UP TO 26.6%

le, oil consumption decreased quarts of oil for the period January 1 to January 20, . Based on our findings, we ve that the product works!"

— Race Driver

"I witnessed the demonstration of a 1965 Chevelle with a 283 Chevy engine that had been treated with 16 ounces of Tephguard and idled for two hours. After this all of the oil was drained from the engine and it was run for 28 laps at Mobile International Raceway, which is a half-mile track. It then ran out of gas. After checking the temperature of the engine, it was found to be normal. It was recranked and to all present ran as satisfactorily as if the oil was still in the case!"



tes, all metal surfaces are per- :d and coated with a micro- layer of polymers and the l carriers have evaporated or ated away.

dvantages of a polymer coat- e many and varied. It allows o flow faster and freer, it es heat, wear and friction.

l in-field tests show mileage ses as high as 26.6% permanently. . .It lasts and should continue to provide these benefits and the only governing factor would be the degree of engine tune.

Another interesting benefit is the reduction of emissions as reported by a New York firm and further confirmed by Automotive Research in San Antonio.

EPA TESTED Table 4. 55 mph Steady State

55 mph	Number of Tests	HC gm/mi	CO gm/mi	NO gm^x/mi	CO_2 gm^2/mi	Fuel Economy mpg
Baseline	4	1.02 ±.12	22.28 ±4.34	4.41 ±.99	478.4 ±13.3	16.88 ±.52
8 oz. Additive	3	1.02 ±.15	22.22 ±8.34	4.99 ±.39	458.3 ±16.7	17.58 ±.92
16 oz. Additive	3	1.10 ±.23	30.44 ±12.11	4.36 ±.57	433.1 ±47.9	18.17 ±2.35

WORLD'S LARGEST INDEPENDENT AUTOMOTIVE LAB
HIGHWAY FUEL ECONOMY TEST
ANALYTICAL DATA

	BEFORE	AFTER
Hydrocarbons (Exhaust)	450.0 ppm	400.0 ppm
Hydrocarbons (Background)	21.0 ppm	15.0 ppm
Carbon Monoxide (Exhaust)	1539.3 ppm	1430.7 ppm
Carbon Monoxide (Background)	2.0 ppm	2.0 ppm
Carbon Dioxide (Exhaust)	2.5180%	2.3080%
Carbon Dioxide (Background)	.0570%	.0570%

TEST RESULTS (GRAMS/MILE)

	BEFORE	AFTER
HC:	2.734	2.428
CO:	18.190	16.966
CO_2:	493.817	448.903
Calculated Fuel Economy:	16.71 mpg	18.37 mpg (increase of 9.93%)

A Cummings Diesel Engine was set up on a dynamometer showing 44 lbs. at 1800 rpm. The following results speak for themselves.

	H POWER	RPM
Before Application of Tephguard	160	1600
15 Minutes after Application	172	2100
30 Minutes after Application	184	2400

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated this said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in the further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Great North American Industries, Inc., and Products on the Move, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Texas, with their principal office and place of business at 104 West Main St., Gainesville, Texas. Respondent Patrick O. McCrary is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondents Great North American Industries,

Inc., a corporation, and Products on the Move, Inc., a corporation, their successors and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the engine oil additive known as Tephguard (Tefguard) or of any other engine oil additive containing polytetrafluoroethylene (PTFE) fluoropolymers in resin or micropowder form, including, but not limited to, "Teflon," "Fluon," and "Halon" resins, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such additive will or may result in substantial fuel economy improvement when used in an automobile, truck, recreational vehicle, or other motor vehicle.

Part II

It is further ordered, That respondents Great North American Industries, Inc., a corporation, and Products on the Move, Inc., a corporation, their successors and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any engine oil additive, any fuel additive, or any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such additive or device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless:

(1) such representation is true; and

(2) at the time of making such representation, respondents rely upon written results of competent, scientific testing on a chassis dynamometer according to the then current urban dynamometer driving schedule (40 C.F.R. 86, Appendix I) and the then current highway fuel economy driving schedule (40 C.F.R. 600, Appendix I) established by the Environmental Protection Agency to substantiate

such representation. Provided that, for any such test, respondents may select the type of vehicle, its model year, its engine size, mileage, fuel type, and motor oil. Any break-in period used in the testing of any engine oil additive, fuel additive, or automobile retrofit device shall be the break-in period specified in the respondents' use directions for such additive or device; and

(3) respondents clearly and conspicuously disclose (i) any limitation on the efficacy of the engine oil additive, fuel additive, or automobile retrofit device; (ii) the characteristics of any vehicle used in any test, including the vehicle type, vehicle model year, engine size, mileage, and the break-in period for the engine oil additive, fuel additive, or automobile retrofit device; and (iii) where any representation of fuel economy improvement from the use of a retrofit device, oil additive, or fuel additive is expressed in miles per gallon, miles per tankful, percentage, or other numerical representation, or where the representation of the benefit from the use of such additive or device is expressed as a monetary saving in dollars, percentage, or other numerical representation, all advertising and other sales promotional materials which contain the representation must also clearly and conspicuously disclose the following disclaimer: "Reminder: Your actual saving may vary. It depends on the kind of driving you do, how you drive, and the condition of your car."

Part III

It is further ordered, That respondents Great North American Industries, Inc., a corporation, and Products on the Move, Inc., a corporation, their successors and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, any performance characteristic of any product or service, other than any representation covered by Part II of this order concerning any engine oil additive, any fuel additive, and any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, unless, at the time of making the representation, respondents possess and reason-

ably rely upon a reasonable basis which substantiates such representation. For any representation of any performance characteristic of any product, other than any representation covered by Part II of this order concerning any engine oil additive, any fuel additive, or any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, such reasonable basis must consist of competent scientific evidence;

b. representing, directly or by implication, that any federal, state, or local governmental agency has approved, in any manner, any product or service unless respondents possess, at the time of making such representation, written and dated authorization from such governmental agency that such representation may appear in advertising or sales promotional materials for the specific purpose for which such representation is used in the advertising or sales promotional materials.

Provided, that this paragraph shall not be construed to prohibit respondents from directly representing that they have tested any product or service in accordance with test procedures established by any federal, state, or local governmental agency so long as such representation is otherwise in compliance with the provisions of this order;

c. representing, directly or by implication, that any consumer endorsement of any product or service which appears in advertising or sales promotional materials reflects the typical experience of consumers with such product or service unless such representation is true;

d. misrepresenting, in any manner, the purpose, content, or conclusion of any test or survey pertaining to any product or service.

Part IV

It is further ordered, That respondents Great North American Industries, Inc., a corporation, and Products on the Move, Inc., a corporation, their successor and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records

which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; all documents which substantiate, contradict, or otherwise relate to any claim which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity; copies of all documents generated by the requirements of Part V of this order. Such documentation relating to advertising shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional material, or post-purchase material was disseminated. Documentation relating to Part V of the order shall be retained by respondents for a period of three (3) years from the last date Exhibit C was disseminated.

Part V

It is further ordered, That respondents shall forthwith distribute a copy of this order to all operating divisions of said corporations, and to all present and future personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order and that respondents shall secure from each such person a signed statement acknowledging receipt of such order.

Respondents shall also, within thirty (30) days of the date this order is served upon them, distribute, via first class mail, a copy of Exhibit C and a copy of this Agreement Containing Consent Order to Cease and Desist to each and every individual or other entity that has purchased from them, through one purchase or through a series of purchases, more than twelve (12) cans of Tephguard. Respondents shall also, at least five (5) days prior to filling any order or series of orders which individually or collectively indicate that more than twelve (12) cans of Tephguard have been ordered by any individual or other entity, distribute, via first class mail or any faster means, a copy of Exhibit C and a copy of this Agreement Containing Consent Order to Cease and Desist to each and every such individual or other entity.

Exhibit C and the envelope containing it shall be the corporate stationery of one of the corporate respondents. The envelope containing Exhibit C shall contain no marking other than name and return address of that corporate respondent, the name and address of the individual or other entity purchasing or ordering Tephguard,

and the words " IMPORTANT NOTICE " conspicuously disclosed on the front of the envelope.

Part VI

It is further ordered, That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Part VII

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of five years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

Part VIII

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Miller did not participate.

EXHIBIT C

Dear Tephguard Customer:

I am enclosing for your information a copy of an Agreement and Consent Order entered into by Great North American Industries, Products on the Move, myself and the Federal Trade Commission.

The Agreement and Consent Order, as stated in the Agreement

itself, is not an admission that any law enforced by the Federal Trade Commission has been violated, but, rather, sets forth certain requirements for any future advertising of Tephguard that Great North American Industries, Products on the Move, and I must follow. These requirements affect you also in the sense that they represent the views of the Federal Trade Commission on how Tephguard should be advertised in the future. I thus encourage you to closely review the enclosed document.

Your continued confidence in our line of products is appreciated.

Very truly yours,

Patrick O. McCrary, President
Great North American Industries, Inc.
and Products on the Move, Inc.

In the Matter of

BALL-MATIC CORPORATION, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3078. Complaint, Oct. 29, 1981—Decision, Oct. 29, 1981

This consent order requires, among other things, an Orange, California corporation and corporate officer to cease representing that the use of the "Ball-Matic" or any similar retrofit device will result in substantial fuel economy improvement. Further, respondents are prohibited from making representations that the use of any retrofit device or product will result in an energy savings, unless substantiated by competent scientific evidence. In addition, where any claim or characterization pertaining to energy savings is made, respondents are barred from making any endorsements without written and dated authorization, and prohibited from making misrepresentations concerning the purpose, content or conclusion of any test or survey.

Appearances

For the Commission: *Laurence M. Kahn* and *William Haynes.*

For the respondent: *Richard Barich,* Los Angeles, Calif.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ball-Matic Corporation, Inc., a corporation, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., hereinafter sometimes referred to as "respondents," have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph 1. Respondent Ball-Matic Corporation, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1336 West Collins, Orange, California.

Respondent Lonnie W. Smith, is President of the corporate respondent Ball-Matic Corporation, Inc. He formulates, directs, and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now and for sometime last past have been engaged in the marketing, advertising, offering for sale, sale, and distribution of a product variously known as the Ball-Matic, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, hereinafter sometimes referred to as "product," which product is advertised as a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. In the course and conduct of their business, the respondents have disseminated or caused the dissemination of certain advertisements for said product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines and newspapers with national circulations; and have disseminated or caused the dissemination of advertisements for said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated or caused to be disseminated by respondents are the materials identified as Exhibits A–I which are attached hereto.

PAR. 5. Through the use of the advertisements referred to in Paragraph Four, and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the Ball-Matic when installed in a typical automobile will significantly improve fuel economy;

b. under normal conditions, a typical driver can ordinarily obtain a fuel economy improvement which will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

c. competent scientific tests prove the fuel economy claims made for the Ball-Matic;

d. results of consumer usage, as evidenced by consumer endorse-

ments, prove that the Ball-Matic significantly improves fuel economy;

e. the consumer endorsements which appear in said advertisements and sales promotional materials reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

PAR. 6. At the time respondents made the representations alleged in Paragraph Five of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 7. In truth and in fact, contrary to respondents' representations in Paragraph Five:

a. the Ball-Matic when installed in a typical automobile will not significantly improve fuel economy;

b. under normal driving conditions, a typical driver cannot ordinarily obtain a fuel economy improvement which will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

c. no competent scientific tests prove the fuel economy claims for the Ball-Matic;

d. results of consumer usage, as evidenced by consumer endorsements, do not prove that the Ball-Matic significantly improves fuel economy;

e. the consumer endorsements which appear in said advertisements do not represent the typical or ordinary experience of members of the public who have used the Ball-Matic.

Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 8. The advertisements referred to in Paragraph Four and other of respondent's advertisements and sales promotional materials represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Five. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations,

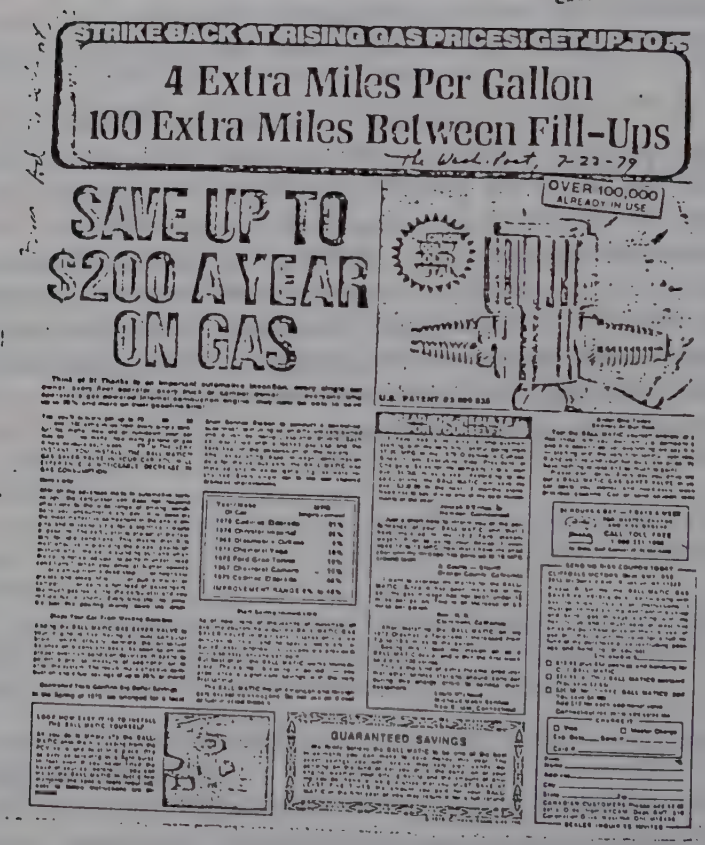
firms and individuals engaged in the sale of automobile retrofit devices.

PAR. 10. The use by respondents of the aforesaid unfair or deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 11. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Chairman Miller did not participate.

Exhibit A


STRIKE BACK AT RISING GAS PRICES! GET UP TO
4 Extra Miles Per Gallon
100 Extra Miles Between Fill-Ups
The Wall Street Journal, 7-23-79
SAVE UP TO $200 A YEAR ON GAS
OVER 100,000 ALREADY IN USE
U.S. PATENT
GUARANTEED SAVINGS

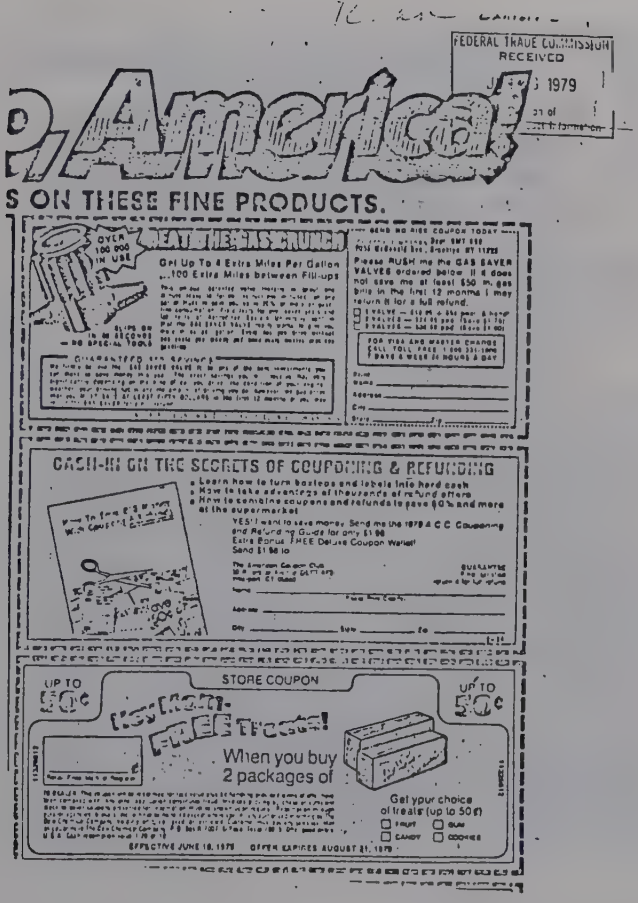
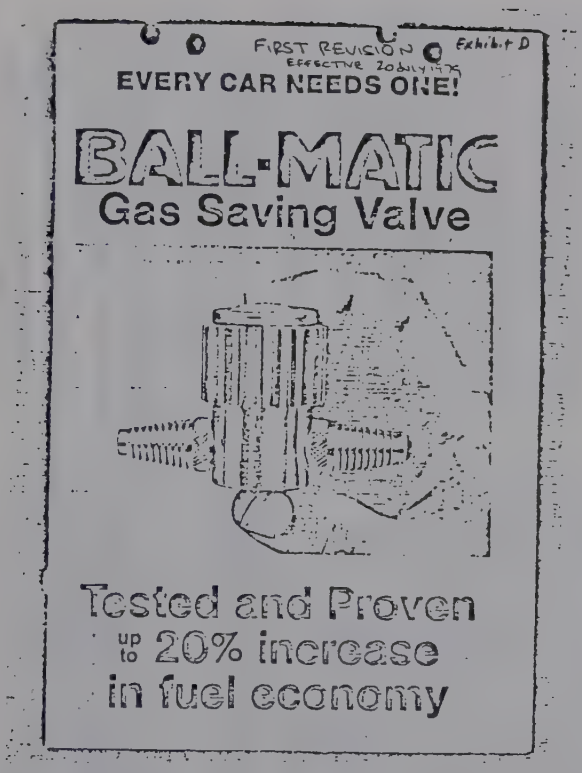

FEDERAL TRADE COMMISSION
RECEIVED
1979
S ON THESE FINE PRODUCTS.
BEAT THE GAS SQUEEZE!
Get Up To 4 Extra Miles Per Gallon
...100 Extra Miles between Fill-ups
Please RUSH me the GAS SAVER VALVES ordered below. If it does not save me at least $50 in gas bills in the first 12 months I may return it for a full refund.
FOR FAST AND EASIER CHARGE CALL TOLL FREE
CASH-IN ON THE SECRETS OF COUPONING & REFUNDING
Learn how to turn bonloss and labels into hard cash
How to take advantage of thousands of refund offers
How to combine coupons and refunds to save 50% and more at the supermarket
YES! I want to save money. Send me the 1979 A.C.C. Couponing and Refunding Guide for only $1.98
Extra Bonus: FREE Deluxe Coupon Wallet!
STORE COUPON
UP TO 50¢
When you buy 2 packages of
Get your choice of treats (up to 50¢)
FRUIT
GUM
CANDY
COOKIES
EFFECTIVE JUNE 18, 1979 OFFER EXPIRES AUGUST 31, 1979

Exhibit C

STRIKE BACK AT RISING GAS PRICES! GET UP TO
4 Extra Miles Per Gallon
100 Extra Miles Between Fill-Ups
SAVE Up To $200 A Year On Gas
OR DOUBLE YOUR MONEY BACK!
See our guarantee
OVER 100,000 ALREADY IN USE
U.S. PATENT #3 909 038
GUARANTEED SAVINGS


FIRST REVISION
Exhibit D
EVERY CAR NEEDS ONE!
BALL-MATIC
Gas Saving Valve
Tested and Proven
up to 20% increase
in fuel economy

BALL-MATIC GAS SAVER VALVE
Questions Most Frequently Asked

Q. WHAT IS THE BALL MATIC?
A. The Ball-Matic is a precision engineered, vacuum operated air bleed type valve. The unit is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads.

Q. WHAT IS THE OPERATING PRINCIPLE OF THE BALL-MATIC?
A. To reduce into the combustion chamber of an automobile engine cool fresh air which, in turn, produces a more efficient combustion whenever the mixture is rich (the vacuum low).

Q. CAN THE BALL-MATIC DAMAGE AN ENGINE?
A. Absolutely not. The Ball-Matic is an automatically controlled valve which only opens when the mixture is rich and then a very opens sufficiently to restore the ideal combustion mixture of 15 parts of air to one part of gasoline.

Q. DOES THE BALL MATIC "LEAN" THE MIXTURE?
A. Technically the unit does not lean the mixture, as that the valve is automatically in a closed position whenever the mixture is lean (high vacuum). The valve opens only when the mixture is rich. The mixture is not lean with it but when the change occurs, the compensation is from rich to normal.

Q. WHAT HAPPENS WHENEVER AN ENGINE NEEDS MORE AIR
A. The answer is simple. The amount of air to the amount of fuel is inadequate at the point of firing in the combustion chamber. Causing a serious loss of power and wasted gasoline. The picture showing probes, firing and all unitions while traversing at speeds in excess of 45 mph and when pulling a trailer or carrying a full load of passengers.

Q. WILL THE BALL MATIC FIT ANY AUTOMOBILE?
A. Yes, the Ball-Matic fits all cars . . . American and some foreign (Volkswagens excluded) from a Cadillac to a Datsun . . . and any gasoline-driven internal combustion engine powering boats, trucks, cars etc.

Q. IF A PERSON GETS A NEW CAR OR TRADES FOR ANOTHER CAR, CAN THEY TRANSFER THE BALL-MATIC?
A. Yes, the Ball-Matic fits all cars, inconvenience to the purchase of jobs.

Q. EXACTLY WHERE IS THE BALL-MATIC INSTALLED?
A. On about all cars on the road today the Ball Matic is installed in the crankcase vent hose leading from the base of the carburetor to the Positive Crankcase Ventilation valve (the PCV Valve). Only a couple of minutes time is needed to install the Ball-Matic since you have located the proper hose.

Q. WILL A PERSON HAVE TO RE-ADJUST THEIR CARBURETOR AFTER INSTALLATION?
A. No. When your engine is idling maximum pressure exists in the manifold. This pressure closes the valve the heart of the Ball-Matic — preserving the engine to idle normally.

Q. WHAT MAKES THE BALL MATIC OPERATE?
A. The Ball-Matic opens or closes automatically from the power of engine vacuum.

Q. WHAT IS THE GUARANTEE ON THE BALL-MATIC?
A. Carlson Associates will replace any Ball-Matic on specials which is not free of defects in materials or workmanship for one year from the date of purchase in addition Carlson will refund the full purchase price to anyone who does not realize an annual savings of at least 6 times the purchase price.

Q. DOES THE BALL MATIC EVER MALFUNCTION?
A. In itself the Ball-Matic should never malfunction however the unit will become inoperative if the Positive Crankcase Ventilation valve is plugged up. Therefore it is very important that you keep the PCV valve always clean as it is not only against the law to operate your automobile with a plugged PCV valve but you will not enjoy all the wonderful benefits of having the Ball-Matic installed under your hood.

Q. IF THE BALL MATIC IS SO GREAT WHY ISN'T IT INSTALLED BY THE CAR COMPANIES AS ORIGINAL EQUIPMENT?
A. We don't know but look at radial tires, electronic ignition systems and even rear view mirrors. All of these were available outside of Detroit first. Frequently, new devices are installed by the car manufacturers only on public demand.

Q. DOES THE UNIT REQUIRE CLEANING?
A. The Ball-Matic requires no maintenance and is self-cleaning.

Q. WHAT PRECAUTIONS MUST ONE TAKE TO MAKE SURE OF ALL THE SAVINGS YOU CLAIM?
A. It is only necessary to make sure your PCV valve is not plugged up and that you have installed the Ball-Matic in the crankcase vent hose leading from the base of the carburetor to the PCV valve on late model automobiles.

Q. WHY IS THE BALL-MATIC NEEDED ON A CAR?
A. Since the 4th annual the internal combustion engine has been relentlessly sharpened, due to design of the carburetor. The carburetor is set at the factory at the idle position for maximum efficiency. The air fuel mixture is set at a 13 to 1 ratio, which is efficient both when a driver 30 to 40 mph (2,000 rpm) is reached at any point the combustion chamber demands more ... reverts to an even richer mixture at low and so this mixture burns incompletely resulting in excessive of gasoline and loss of power through engine, and combustion. The Ball-Matic was designed to eliminate this loss of power — thus increasing power — as provides a situation where there is a Carbon build-up thus consuming engine wear to permit quicker acceleration and better engine performance.

In 1977, the 113,696,111* registered automobiles in the U.S. consumed 107,978,395,000 gallons of gasoline. If each of these vehicles had a Ball-Matic, the potential savings would have been almost *6 million gallons of gasoline per day.*

*Source: U.S. Dept. of Transportation — Federal Highway Administration.

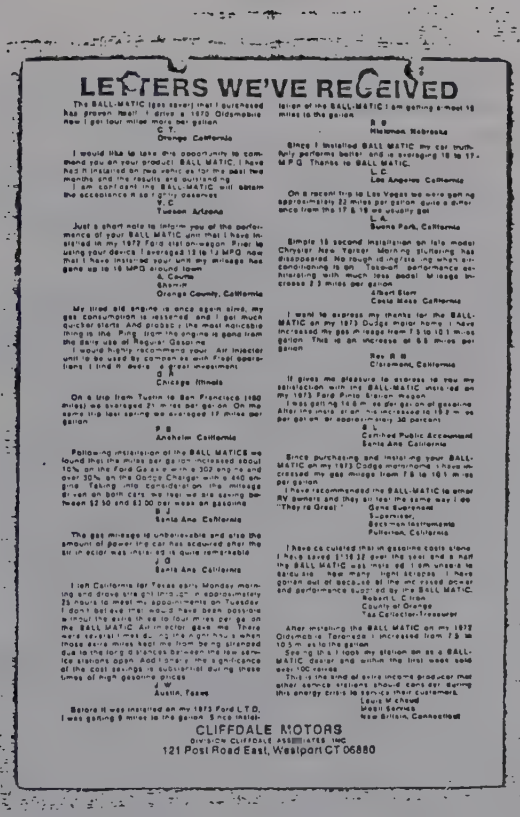
ANNUAL SAVINGS WITH 20% INCREASE IN FUEL ECONOMY

Assuming Gasoline At 80¢ Per Gallon

Miles Driven Per Year	MILES PER GALLON YOUR CAR GETS NOW				
	5 mpg	10 mpg	15 mpg	20 mpg	25 mpg
5,000	$ 160.00	$ 80.00	$ 53.33	$ 40.00	$ 32.00
10,000	320.00	160.00	106.67	80.00	64.00
15,000	480.00	240.00	160.00	120.00	96.00
20,000	640.00	320.00	213.33	160.00	128.00
30,000	960.00	480.00	320.00	240.00	192.00
40,000	1,280.00	640.00	426.67	320.00	256.00
50,000	1,600.00	800.00	533.33	400.00	320.00

This chart is based on a 20% increase in miles per gallon assuming an average cost of gasoline at 80¢ per gallon. The specific economy achieved with the BALL MATIC will vary with the efficiency of each engine, driving habits, local driving conditions and the price of gasoline in each area.

© 1975 Carlson Associates



LETTERS WE'VE RECEIVED

The BALL-MATIC (gas saver) that I purchased has proven itself. I drive a 1970 Oldsmobile now I get four miles more per gallon.

C. T.
Orange, California

I would like to take this opportunity to commend you on your product BALL MATIC. I have had it installed on two vehicles for the past two months and the results are outstanding.

I am confident the BALL-MATIC will obtain the acceptance it so rightly deserves.

Y. C.
Tucson, Arizona

Just a short note to inform you of the performance of your BALL MATIC unit that I have installed in my 1972 Ford station wagon. Prior to using your device I averaged 13 to 14 MPG now that I have installed your unit my mileage has gone up to 16 MPG around town.

A. Coutts
Sherrill
Orange County, California

My tired old engine is once again alive, my gas consumption is lessened and I get much quicker starts. And probably the most noticable thing is the "Ping" from the engine is gone from the daily use of Regular Gasoline.

I would highly recommend your Air Injector unit to be used by companies with Fleet operations. I find it overall a great investment.

D. R.
Chicago, Illinois

On a trip from Tustin to San Francisco (180 miles) we averaged 21 miles per gallon. On the same trip last spring we averaged 17 miles per gallon.

P. B.
Anaheim, California

Following installation of the BALL MATIC we found that the miles per gallon increased about 10% on the Ford Galaxie with a 302 engine and over 30% on the Dodge Charger with a 440 engine. Taking into consideration the mileage driven on both cars, we feel we are saving between $2.50 and $3.00 per week on gasoline.

B. J.
Santa Ana, California

The gas mileage is unbelievable and also the amount of power the car has acquired after the air injector was installed is quite remarkable.

J. G.
Santa Ana, California

I left California for Texas early Monday morning and drove straight through in approximately 25 hours to meet my appointments on Tuesday. I don't believe that would have been possible without the extra three to four miles per gallon the BALL MATIC Air Injector gave me. There were several times during the night hours when those extra miles kept me from being stranded due to the long distances between the few service stations open. Additionally, the significance of the cost savings is substantial during these times of high gasoline prices.

J. W.
Austin, Texas

Before it was installed on my 1973 Ford L.T.D. I was getting 9 miles to the gallon. Since installation of the BALL-MATIC I am getting almost 18 miles to the gallon.

R. B.
Hickman, Nebraska

Since I installed BALL MATIC my car truthfully performs better and is averaging 16 to 17 M.P.G. Thanks to BALL MATIC.

L. C.
Los Angeles, California

On a recent trip to Las Vegas we were getting approximately 22 miles per gallon, quite a difference from the 17 & 18 we usually get.

L. A.
Buena Park, California

Simple 15 second installation on late model Chrysler New Yorker. Morning stuttering has disappeared. No rough idling/stalling when air-conditioning is on. Take-off performance exhilarating with much less pedal. Mileage increase 2.3 miles per gallon.

Albert Stern
Costa Mesa, California

I want to express my thanks for the BALL-MATIC on my 1973 Dodge motor home. I have increased my gas mileage from 7.5 to 10.1 miles gallon. This is an increase of 6.6 miles per gallon.

Rev. R. B.
Claremont, California

It gives me pleasure to express to you my satisfaction with the BALL-MATIC installed on my 1973 Ford Pinto Station wagon.

I was getting 16.6 miles per gallon of gasoline. After the installation this increased to 19.2 miles per gallon or approximately 30 percent.

B. L.
Certified Public Accountant
Santa Ana, California

Since purchasing and installing your BALL-MATIC on my 1973 Dodge motorhome, I have increased my gas mileage from 7.5 to 10.1 miles per gallon.

I have recommended the BALL-MATIC to other RV owners and they all feel the same way I do. "They're Great."

Gene Sugerman
Supervisor,
Beckman Instruments
Fullerton, California

I have calculated that in gasoline costs alone I have saved $136.32 over the past and a half the BALL MATIC was installed. I am unable to calculate how many flight scrapes I have gotten out of because of the increased power and performance supplied by the BALL MATIC.

Robert L. Citron
County of Orange
Tax Collector-Treasurer

After installing the BALL MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

Seeing this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.

This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

Louis Michaud
Mobil Service
New Britain, Connecticut

CLIFFDALE MOTORS
DIVISION CLIFFDALE ASSOCIATES, INC.
121 Post Road East, Westport CT 06880

Exhibit E

Without the BALL-MATIC™
you're wasting up to $200 or more
a year on gasoline!
EVERY CAR
NEEDS ONE!
OVER 100,000
ALREADY IN USE
U.S. PATENT
#3,809,035
GUARANTEED SAVINGS
Order One Today
Energy At My Door
34 HOURS A DAY-7 DAYS A WEEK
FOR MASTER CHARGE
AND VISA ORDERS
CALL TOLL FREE
1 800 331 1058

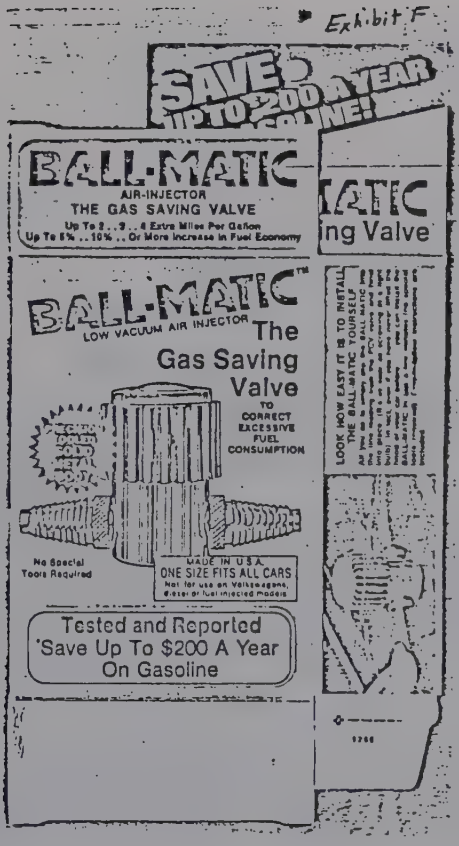
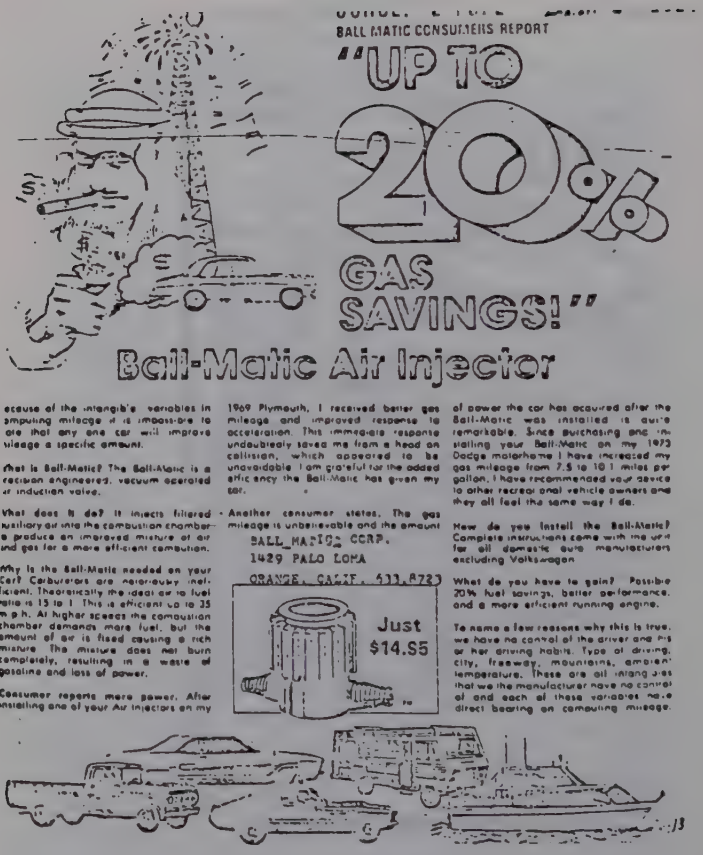
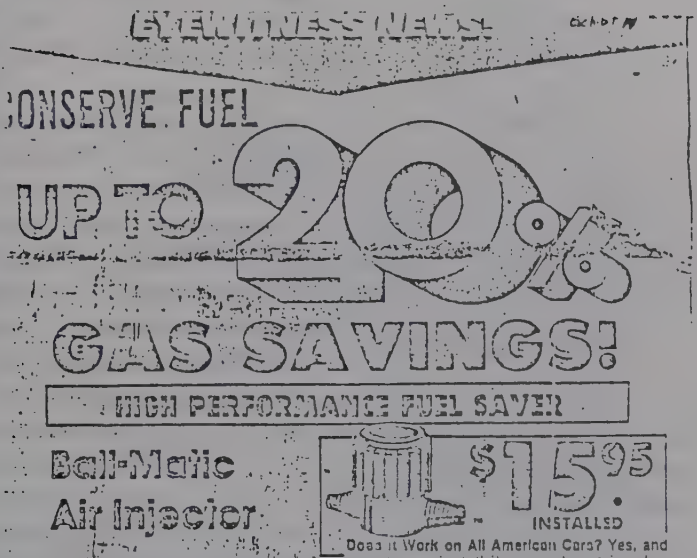


Exhibit F
SAVE
UP TO $200 A YEAR
BALL-MATIC
AIR-INJECTOR
THE GAS SAVING VALVE
Up To 2...3...4 Extra Miles Per Gallon
Up To 5%...10%...Or More Increase In Fuel Economy
ATIC
ing Valve
BALL-MATIC™
LOW VACUUM AIR INJECTOR
The
Gas Saving
Valve
TO
CORRECT
EXCESSIVE
FUEL
CONSUMPTION
LOOK HOW EASY IT IS TO INSTALL
THE BALL-MATIC YOURSELF
No Special
Tools Required
MADE IN U.S.A.
ONE SIZE FITS ALL CARS
Not for use on Volkswagens,
diesel or fuel injected models
Tested and Reported
*Save Up To $200 A Year
On Gasoline


BALL MATIC CONSUMERS REPORT
"UP TO
20%
GAS
SAVINGS!"
Ball-Matic Air Injector
because of the intangible variables in computing mileage it is impossible to say that any one car will improve mileage a specific amount.
What is Ball-Matic? The Ball-Matic is a precision engineered, vacuum operated air induction valve.
What does it do? It injects filtered auxiliary air into the combustion chamber to produce an improved mixture of air and gas for a more efficient combustion.
Why is the Ball-Matic needed on your Car? Carburetors are notoriously inefficient. Theoretically the ideal air to fuel ratio is 15 to 1. This is efficient up to 35 m.p.h. At higher speeds the combustion chamber demands more fuel, but the amount of air is fixed causing a rich mixture. The mixture does not burn completely, resulting in a waste of gasoline and loss of power.
Consumer reports more power. After installing one of your Air Injectors on my 1969 Plymouth, I received better gas mileage and improved response to acceleration. This immediate response undoubtedly saved me from a head on collision, which appeared to be unavoidable. I am grateful for the added efficiency the Ball-Matic has given my car.
Another consumer states, The gas mileage is unbelievable and the amount
BALL MATIC CORP.
1429 PALO LOMA
ORANGE, CALIF. 633-8723
Just
$14.95
of power the car has acquired after the Ball-Matic was installed is quite remarkable. Since purchasing and installing your Ball-Matic on my 1973 Dodge motorhome I have increased my gas mileage from 7.5 to 10.1 miles per gallon. I have recommended your device to other recreational vehicle owners and they all feel the same way I do.
How do you install the Ball-Matic? Complete instructions come with the unit for all domestic auto manufacturers excluding Volkswagen.
What do you have to gain? Possible 20% fuel savings, better performance, and a more efficient running engine.
To name a few reasons why this is true, we have no control of the driver and his or her driving habits. Type of driving, city, freeway, mountains, ambient temperature. These are all intangibles that we the manufacturer have no control of and each of these variables have direct bearing on computing mileage.



What Is the Ball-Matic? The Ball-Matic is a precision-engineered, vacuum-operated air induction valve.

What Does It Do? It injects filtered air into the combustion chamber to produce the improved mixture of air and gas that your car needs for that "extra" performance.

Why Is the Ball-Matic Needed on Your Car? Carburetors are notoriously inefficient. Most carburetors are set at a 15 to 1 ratio of air to fuel. This is efficient up to about 35 MP.H. At higher speeds, the combustion chamber demands more fuel. But the amount of air entering the chamber is fixed causing too rich a mixture. The mixture does not burn completely, resulting in gasoline waste and loss of power. The Ball-Matic was designed to improve the mixture of air and fuel at all speeds. Results: Gas Savings And More

Does It Work on All American Cars? Yes, and anyone can install it on most cars in a few minutes. It works on your bumper, truck or boat engine! For Foreign cars see instruction sheets.

How do you Install the Ball-Matic on Your Car? Complete instructions come with the unit for all major automobile manufacturers, excluding Volkswagens.

What Have You Got to Gain? Amazing Gas Savings. Up to 20%! New found power, effortless cruising, even up steep hills or when hauling trailers, campers, etc. A cleaner, more efficiently running engine with less carbon build-up.

Guarantee. The Ball-Matic is guaranteed to be free from defects in workmanship and materials. Your authorized dealer will replace or refund full purchase price on any unit that is inoperative under normal use for a period of up to one year from date of pur-

Exhibit I p400

BALL-MATIC AIR INJECTOR

QUESTIONS MOST FREQUENTLY ASKED

1. Q. WHAT IS THE BALL MATIC?
   A. The Ball Matic is a precision engineered, vacuum-operated air induction valve. The unit is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads.

2. Q. WHAT IS THE OPERATING PRINCIPLE OF THE BALL MATIC?
   A. To induce into the combustion chamber of an automobile engine cool, fresh, filtered air which, in turn, produces a more efficient combustion whenever the mixture is rich (the vacuum low).

3. Q. CAN THE BALL MATIC DAMAGE MY ENGINE?
   A. Absolutely not. The Ball Matic is an automatically controlled valve which only opens when the mixture is rich, and then it only opens sufficiently to restore the ideal combustion mixture of 15 parts of air to one part of gasoline.

4. Q. DOES THE BALL MATIC "LEAN" THE MIXTURE?
   A. Technically, the unit does not lean the mixture, in that the valve is automatically in a closed position whenever the mixture is lean (high vacuum). The valve opens only when the mixture is rich. The mixture at no time cuts from thin to thinner, instead, the compensation is from rich to normal.

5. Q. WHAT HAPPENS WHENEVER MY ENGINE NEEDS MORE AIR?
   A. The answer is simple. The amount of air to the amount of fuel is inadequate at the point of firing in the combustion chamber, causing a severe loss of power and wasted gasoline. This occurs whenever the vacuum is low, such as when the car is starting up again from a dead stop, while negotiating grades, hills and mountains, while traveling at speeds in excess of 45 mph, and when pulling a trailer or carrying a full load of passengers.

   Whenever these conditions occur, there is a drop in the engine vacuum caused by the mixture being too rich. Now the Ball-Matic opens, permitting cool, filtered air to enter the intake manifold and restore the proper air to fuel ratio.

6. Q. WILL THE BALL MATIC FIT MY PARTICULAR AUTOMOBILE?
   A. Yes, the Ball Matic fits all cars . . . American and most foreign (Volkswagens excluded) from a Cadillac to a Datsun . . . and any gasoline-driven internal combustion engine powering boats, trucks, vans, etc.

7. Q. IF I GET A NEW CAR OR TRADE FOR ANOTHER CAR, CAN I TRANSFER THE BALL MATIC?
   A. Yes, the Ball Matic fits all cars, transference is the simplest of jobs.

8. Q. EXACTLY WHERE IS THE BALL MATIC INSTALLED?
   A. On most all cars on the road today, the Ball Matic is installed in the crankcase vent hose leading from the base of the carburetor to the Positive Crankcase Ventilation valve (the PCV Valve). Only a couple of minutes time is needed to install the Ball Matic once you have located the proper hose.

9. Q. WILL I HAVE TO RE-ADJUST MY CARBURETOR AFTER INSTALLATION?
   A. No. When your engine is idling, maximum pressure exists in the manifold. This pressure closes the valve — the heart of the Ball Matic — allowing the engine to idle normally.

10. Q. WHAT MAKES THE BALL MATIC OPERATE?
    A. The Ball Matic opens or closes automatically from the power of engine vacuum.

11. Q. WHAT IS THE GUARANTEE ON THE BALL MATIC?
    A. Ball Matic Sales Corporation will replace any Ball Matic air injector which is not free of defects in materials or workmanship, for one year from the date of purchase.

12. Q. DOES THE BALL MATIC EVER MALFUNCTION?
    A. In itself, the Ball Matic should never malfunction. However, the unit will become inoperative if the Positive Crankcase Ventilation valve is plugged up. Therefore, it is very important that you keep the PCV valve always clean, as it is not only against the law to operate your automobile with a plugged PCV valve, but you will not enjoy all of the wonderful benefits of having the Ball-Matic installed under your hood.

13. Q. IF THE BALL MATIC IS SO GREAT, WHY ISN'T IT INSTALLED BY THE CAR COMPANIES AS ORIGINAL EQUIPMENT?
    A. We don't know, but look at radial tires, electronic ignition systems, and even rear view mirrors. All of these were available outside of Detroit first. Frequently, new devices are installed by the car manufacturers only on public demand.

14. Q. DOES THE UNIT REQUIRE CLEANING?
    A. The Ball Matic requires no maintenance and is self cleaning. At about 30,000 miles, clean the filter by swishing in solvent.

15. Q. WHAT PRECAUTIONS MUST I TAKE TO MAKE SURE I ENJOY ALL THE WONDERFUL BENEFITS YOU CLAIM?
    A. It is only necessary to make sure your PCV valve is not plugged up and that you have installed the Ball Matic in the crankcase vent hose leading from the base of the carburetor to the PCV valve on all late model automobiles.

16. Q. WHY IS THE BALL MATIC NEEDED ON MY CAR?
    A. Since its inception, the internal combustion engine has been notoriously inefficient, due to the design of the carburetor. The carburetor is set at the factory in the idle position for maximum efficiency. The air fuel mixture is set at a 15 to 1 ratio, which is inefficient only until a speed of 30 to 40 mph (2,000 rpm) is reached. At this point, the combustion chamber demands more fuel and the amount of gasoline entering the chamber increases while the amount of air is fixed. This results in an overly rich mixture of fuel and air; this mixture burns incompletely, resulting in waste of gasoline and loss of power through inefficient combustion. The Ball Matic was designed to minimize this loss of power — thus increasing power — to provide a situation where there is less carbon build up, thus minimizing engine wear . . . to permit quicker acceleration and better engine performance.

15

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated this said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in the further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ball-Matic Corporation, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 1336 West Collins, Orange, California. Respondent Lonnie W. Smith is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his principal office and place of business is located at the above address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

Order

Part I

It is ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, or of any other automobile retrofit device having substantially similar properties, as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle.

Part II

It is further ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondents possess and rely upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by the Environmental Protection Agency and these results substantiate such representation, and (3) where the representation of the fuel economy improvement from use of such device is expressed in miles per gallon, miles per tankful, or percentage, or

where the representation of the benefit from use of such device is expressed as a monetary saving in dollars or percentage, all advertising and other sales promotional materials which contain the representation expressed in such a way must also clearly and conspicuously disclose the following disclaimer: " REMINDER: Your actual saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car."

Part III

It is further ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. using, publishing, or referring to any endorsement from any person or organization concerning any energy consumption or energy saving characteristic of any product unless, within the twelve (12) months immediately preceding any such use, publication, or reference, respondents have obtained from that person or organization an express written and dated authorization for such use, publication, or reference;

b. representing, directly or by implication, any energy consumption or energy saving characteristic of any product, other than any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, unless, at the time of making the representation, respondents possess and reasonably rely upon competent scientific evidence which substantiates such representation;

c. misrepresenting, in any manner, the purpose, content, or conclusion of any test or survey pertaining to any energy consumption or energy saving characteristic of any product;

d. misrepresenting, in any manner, either preference for any product or service or the results obtained through usage of any product where such preference or results pertain to any energy consumption or energy saving characteristic of such product.

Part IV

It is further ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents authorizing use, publication or reference to endorsements; documents which substantiate, contradict, or otherwise relate to any claim pertaining to any energy consumption or energy saving characteristic of any product which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional material, or post-purchase material was disseminated.

Part V

It is further ordered, That respondents forthwith distribute a copy of this order to all operating divisions of said corporation, and to all present and future personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order and that respondents shall secure from each such person a signed statement acknowledging receipt of such order.

Part VI

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Part VII

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

Part VIII

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Miller did not participate.

IN THE MATTER OF

LEHIGH PORTLAND CEMENT COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9142. Complaint, July 30, 1980—Decision, Oct. 30, 1981

This consent order requires, among other things, an Allentown, Pennsylvania corporation engaged in the production of cement to divest, in accordance with the terms of the Order, the Universal plant at Hannibal, Missouri and three Midwestern States distribution facilities. The order also bars the company for specified time periods, from making certain acquisitions in prescribed areas, without prior Commission approval.

Appearances

For the Commission: *Stephen Riddell* and *Seth B. Zimmerman.*

For the respondent: *Richard C. Lowery* and *Nolan E. Clark, Kirkland & Ellis,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lehigh Portland Cement Company ("Lehigh"), a corporation subject to the jurisdiction of the Commission, intends to acquire the assets of the Universal Atlas Division ("Universal") of the United States Steel Corporation ("U.S. Steel"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. Section 45(b), stating its charges as follows:

I. Definitions

1. For the purpose of this complaint the following definitions shall apply:

a. *Portland cement* includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. *Relevant Market* refers to the manufacture and sale of portland cement in the "Midwestern Market," which consists of the northeastern region of the State of Missouri, the State of Iowa, the southern region of the State of Minnesota, the western region of the State of Wisconsin, the State of Illinois excluding the southern region, and the northwestern region of the State of Indiana.

II. Lehigh

2. Lehigh is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office at 718 Hamilton Mall, Allentown, Pennsylvania.

3. Lehigh is a wholly-owned subsidiary of Heidelberg Cement, Inc. (a corporation organized and existing under the laws of the State of Delaware), which is a wholly-owned subsidiary of Heidelberger Zement Aktiengesellschaft ("Heidelberger") (a corporation organized and existing under the laws of the Federal Republic of Germany).

4. Lehigh is engaged primarily in the production and sale of portland cement.

5. In 1979, Lehigh had total sales of $104,700,000 and total assets in 1980 of $167,000,000.

6. Lehigh has portland cement plants located in Iowa, Indiana, Maryland, New York, and Washington. Lehigh's Mason City, Iowa and Mitchell, Indiana plants sell portland cement in the Midwestern Market.

III. U.S. Steel

7. U.S. Steel is a corporation organized and existing under the laws of the State of New Jersey, with its principal office at 600 Grant Street, Pittsburgh, Pennsylvania.

8. U.S. Steel's cement manufacturing division, Universal Atlas, produces and sells portland cement and specialty cement.

9. In 1979, Universal had total sales of approximately $156,000,000 and total assets in 1980 of $138,000,000.

10. Universal has portland cement plants located in Missouri, Kansas, Alabama, Indiana, Wisconsin, Illinois, Pennsylvania, and Texas. Universal's Buffington, Indiana and Hannibal, Missouri plants sell portland cement in the Midwestern Market.

IV. Jurisdiction

11. At all times relevant herein U.S. Steel and Lehigh have been engaged in the production and sale of portland cement in interstate

commerce and U.S. Steel and Lehigh are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15 U.S.C. 12, *et seq.*, and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*

V. The Acquisition

12. On or about February 15, 1980, Heidelberger and U.S. Steel entered into an agreement in principle which provides, *inter alia,* for the acquisition of the assets of Universal. Heidelberger and U.S. Steel have been working toward a final agreement and plan that on July 31, 1980, or soon thereafter, Lehigh will acquire Universal's assets, including the cement plants at Hannibal and Buffington.

VI. Trade and Commerce

13. The relevant line of commerce is the manufacture and sale of portland cement.

14. The relevant section of the country is the Midwestern Market.

VII. Actual Competition

15. U.S. Steel and Lehigh are now and have been for many years actual competitors in the manufacture and sale of portland cement within certain geographic markets, including the Midwestern Market.

VIII. Effects

16. The effects of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Lehigh and U.S. Steel in the relevant market may be eliminated;

(b) actual competition among competitors generally in the relevant market may be lessened;

(c) concentration in the relevant market may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other portland cement producers in the relevant market may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in that market; and

(e) barriers to entry into the relevant market may be increased.

Violations Charged

17. By reason of the foregoing, the proposed acquisition by Lehigh of the assets of Universal constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Lehigh Portland Cement Company (hereinafter "Lehigh"), its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Lehigh of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Lehigh that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Lehigh Portland Cement Company is a corporation organized, existing and doing business under the laws of the State of Pennsylva-

nia with its principal office located at 718 Hamilton Mall, Allentown, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this Order, the following definitions shall apply:

1. "Lehigh" means Lehigh Portland Cement Company, a corporation, organized, existing and doing business under the laws of the State of Pennsylvania with its principal office located at 718 Hamilton Mall, Allentown, Pennsylvania, and its subsidiaries and the successors and assigns of its business. For the purpose of Paragraphs III, IV, VI and VII of this Order only, "Lehigh" also includes Heidelberg Cement, Inc. (hereinafter "HCI"), a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office located at 100 West Tenth Street, Wilmington, Delaware, and its subsidiaries and the successors and assigns of its business, and Heidelberger Zement Aktiengesellshaft (hereinafter "Heidelberger"), a corporation organized, existing and doing business under the laws of the Federal Republic of Germany, with its principal office located at Berliner Strasse 6, 6900 Heidelberg, West Germany, and its subsidiaries and the successors and assigns of its business.

2. With respect to any business entity named herein, "Subsidiary" means any corporation in which such named business entity owns more than fifty percent (50%) of the outstanding shares of a class of securities having voting power to elect a majority of the Board of Directors of the corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

3. "Cement" means portland cement clinker or finished portland cement Types I through V, as specified by the American Society for Testing and Materials. Neither masonry cement, white cement, masonry clinker, nor white cement clinker is included.

4. "Lehigh Cement Manufacturing Plant" means a facility which is then owned by Lehigh, HCI or Heidelberger and which is then engaged in the manufacture of Cement or has been engaged in the manufacture of Cement within the immediately preceding twelve (12) months. For any acquisition(s) of Assets subject to Paragraph IV

of this Order, "Lehigh Cement Manufacturing Plant" shall be determined as of the date of each such acquisition of Assets.

5. "Plant Area" means (i) the area included within the States of Missouri, Iowa, Minnesota, Wisconsin, and Illinois so long as a Lehigh Cement Manufacturing Plant is located within any of these states and (ii) each area in the United States within a 300 mile radius of any Lehigh Cement Manufacturing Plant (except for the facility located at Buffington, Indiana) not located within such states. For any acquisition(s) of Assets subject to Paragraph IV of this Order, "Plant Area" shall be determined as of the date of each such acquisition of Assets.

6. With respect to any acquisition subject to Paragraph IV of this Order, "Assets" means:

(a) any Cement manufacturing plant located in any Plant Area other than a Cement manufacturing plant that has not been engaged in the manufacture of Cement for at least twelve (12) months immediately preceding its acquisition;

(b) any Cement distribution terminal located in any Plant Area other than a Cement distribution terminal that has not been used as a Cement distribution terminal for at least three (3) months immediately preceding its acquisition; or

(c) any equity interest in a business entity, corporate or non-corporate (other than the equity securities of a business entity in which Lehigh owned an equity interest as of February 29, 1980), which owns a facility or facilities described in (a) or (b) above.

7. "U.S. Steel" means United States Steel Corporation, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office located at 600 Grant St., Pittsburgh, Pennsylvania.

8. "Hannibal Plant" means the Cement manufacturing plant located at Hannibal, Missouri and the Cement distribution terminals located at Summit, Illinois, Bettendorf, Iowa and St. Louis, Missouri, all of which Lehigh has acquired from U.S. Steel, together with such other assets associated with the plant and terminals as may be necessary for the plant and terminals to operate as a going concern and a viable competitor in the production and sale of Cement.

I

It is ordered, That within two (2) years from the date on which this Order becomes final, Lehigh, its directors, officers, employees, and agents shall divest absolutely all right, title and interest in the

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Hannibal Plant together with any and all additions and improvements thereto. Divestiture shall be made to an acquirer or acquirers subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That pending divestiture of the assets required by Paragraph I of this Order, Lehigh shall not cause or permit the wasting or deterioration of such assets, in any manner which may impair the marketability or viability of any such assets, except for normal wear and tear or in the ordinary course of operation.

III

It is further ordered, That the divestiture required by this Order shall not be made, directly or indirectly, to any person who, at the time of divestiture, is a director, officer, employee or agent of, or is otherwise under the control or direction of, Lehigh.

IV

It is further ordered, That, for a period of ten (10) years from the date on which this Order becomes final, Lehigh shall not acquire, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of any Assets, located in any Plant Area(s) in which Lehigh, at the time of the acquisition, is then engaged in the manufacture of Cement at a Lehigh Cement Manufacturing Plant.

Provided, however, that if Lehigh acquires any Assets which are located only in Plant Area(s) in which no Lehigh facility is then engaged in the manufacture of Cement, but in which any Lehigh facility has been engaged in the manufacture of Cement within twelve (12) months immediately preceding such acquisition of Assets, then Lehigh shall not, without prior Commission approval, engage in the manufacture of Cement at such non-operating facility or facilities for a period of twelve (12) months from the date of such acquisition of Assets or for a period of ten (10) years from the date on which this Order becomes final, whichever period is greater.

Further provided, however, that nothing in this Paragraph affects the lawfulness, under the antitrust laws of the United States, of any acquisition of Assets by Lehigh.

V

It is further ordered, That within one hundred twenty (120) days from the date on which this Order becomes final, and every one hundred twenty (120) days thereafter until it has fully complied with Paragraph I of this Order, Lehigh shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Lehigh to make public its desire to divest the assets described herein, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

VI

It is further ordered, That within ninety (90) days of January 1, 1982, and annually thereafter until the expiration of the prohibitions in Paragraph IV of this Order, Lehigh shall submit in writing to the Federal Trade Commission verified reports listing all acquisitions of any equity interest in, and mergers with, any business entity, corporate or non-corporate, engaged in the production of Cement in the United States, the date of each such acquisition or merger, and such additional information relating thereto as may from time to time be requested.

VII

It is further ordered, That Lehigh shall notify the Commission at least thirty (30) days prior to any proposed corporate changes which may affect compliance obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations.

IN THE MATTER OF

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 959

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2963. Order, May 9, 1979—Modifying Order, Nov. 2, 1981

In response to recent appeals court decisions under the National Labor Relations Act (NLRA), this order reopens the proceeding and modifies the Commission's order issued on May 9, 1979 (44 FR 34923, 93 F.T.C. 739) by modifying the last proviso of the first ordering paragraph, so as to permit Local 959 to negotiate NLRA-authorized subcontracting agreements with construction industry employers.

ORDER

The Commission on September 18, 1981 having issued an order against respondent to show cause why the proceeding herein should not be reopened for the purpose of modifying the first ordering paragraph of the consent order to cease and desist entered on May 9, 1979; and respondent having answered that it has no objection to the reopening of the proceeding and the modification of the consent order, as set forth in the order to show cause;

Accordingly, *It is ordered,* That the matter is reopened and that the first ordering paragraph of the order herein is modified so that it will read:

It is ordered, That respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 959, its successors and assigns, affiliated sub-divisions, officers, trustees, employees, agents and members, directly or indirectly through any other form of business organization, shall forthwith cease and desist from:

1. Entering into any agreement or understanding that requires an employer engaged in the construction business to use or deal only with third party businesses who agree to perform work on the same terms and conditions as are agreed to between such employer engaged in the construction business and respondent;

2. Entering into any agreement or understanding with an employer engaged in the construction business that requires a third party business to be signatory to a collective bargaining agreement

or other type of agreement that is binding between respondent and such employer engaged in the construction business;

3. Entering into any agreement or understanding with an employer engaged in the construction business that requires respondent to agree to the same terms and conditions of employment with a third party business as are binding between respondent and such employer engaged in the construction business;

4. Taking any action which would discriminate against or economically injure those employers engaged in the construction business which deal with third party businesses on terms other than those agreed to between such employer engaged in the construction business and respondent.

Provided, however, That respondent shall not be prohibited from engaging in any legal activity now or later authorized by federal labor law such as the right of respondent to engage in standards picketing, or entering into any agreement authorized by Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e).

IN THE MATTER OF

SOUTHWEST SUNSITES, INC., ET AL.

Docket 9134. Interlocutory Order, Nov. 10, 1981

AFFIRMATION OF ALJ ORDER DENYING RESPONDENTS MOTION FOR PARTIAL SUMMARY DECISION

ORDER

Respondents Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc. II, Sydney Gross and Edwin Kritzler (collectively "subdivider respondents") have filed an interlocutory appeal from the Administrative Law Judge's ("ALJ") Order Denying Respondents' Motion for Partial Summary Decision, dated October 8, 1980. Pursuant to Section 3.23(b) of the Commission's Rules of Practice, the ALJ, on November 28, 1980, authorized this interlocutory appeal upon a determination that "immediate review may advance the termination of the litigation." (November 26 Order at 4.) For the reasons set forth below, the Commission denies the appeal, having determined that resolution of the issues posed by developer respondents should await development of a full factual record.

I.

The Commission issued the complaint in this matter on April 29, 1980. The complaint charges that the subdivider respondents are engaged in the business of acquiring undeveloped land, subdividing the land into lots, and advertising and selling the lots to the public (Compl. ¶ 4); that the lots are sold by standard installment contracts, over terms of up to 10 years, pursuant to which the subdivider respondents retain title to the lots until the final installments are paid (Compl. ¶ 5); and that the subdivider respondents represent that (i) the lots are good investments and there is little or no financial risk involved in the purchase, and (ii) the lots are suitable for use by purchasers as homesites, farms and ranches. (Compl. ¶¶ 9, 12.) The complaint further alleges that in fact the lots have not been and are not good investments involving little or no financial risk to investors, and that the lots are not suitable for use by purchasers as homesites, farms or ranches. (Compl. ¶¶ 10, 13.)

Finally, the complaint alleges that the subdivider respondents "have induced and are continuing to induce purchasers of lots * * * to make payments due on their contracts, as well as additional payments substantially in advance of their due dates as provided for

in said contracts." (Compl. ¶ 15.) Such payments are allegedly induced not only by the representations concerning the quality of the investment and the suitability of the lots for use by the purchasers, but "by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning or relating to the subdivisions." (*Id.*)

The notice of contemplated relief that accompanied the complaint stated that if the Commission should determine from the record developed herein that the respondents have violated Section 5 as alleged in the complaint, "the Commission may order such relief as is supported by the record and is necessary and appropriate * * *." Specifically, the notice stated that such relief may include, *inter alia,* (i) "[r]equiring the installation of all improvements promised by subdivider respondents within a reasonable period of time"; (ii) "[r]equiring the mailing of a form letter to all current customers informing them of certain facts concerning their purchase and offering them the right to discontinue payments and receive any refund of monies paid in excess of the lot's fair market value"; (iii) granting purchasers "the right to discontinue payments and to receive a refund of monies paid in excess of the fair market value of the purchasers' lots"; (iv) "[r]equiring the payment of all taxes, mortgage payments, and other obligations on the land"; and (v) "other provisions appropriate to correct the unfair and deceptive practices engaged in by respondents."

On July 31, 1980, the developer respondents moved for a partial summary decision, pursuant to Section 3.24(a)(2) of the Commission's Rules of Practice. They argued that the above-mentioned items listed in the notice of contemplated relief are beyond the Commission's authority to order, relying principally upon *Heater* v. *FTC,* 503 F.2d 321 (9th Cir. 1974). They further contended that the question of the Commission's remedial authority in this case is foreclosed under principles of collateral estoppel by the district court's decision in *FTC* v. *Southwest Sunsites, Inc., et al.,* No. CA 3–80–258–F (N.D. Tex), *appeal pending* No. 80–1793 (5th Cir.).

II.

The developer respondents have raised important and difficult questions concerning the scope of the Commission's remedial authority in this proceeding. The Commission has concluded, however, that those issues should be resolved on a complete factual record, rather than through a partial summary decision.

Section 3.24 of the Commission's Rules of Practice contemplates

both full and partial summary decisions. Both procedures can be useful in appropriate cases, but they serve somewhat different purposes. A full summary decision can be used to resolve an entire case where the material facts are undisputed and a trial is needless. In contrast, a partial summary decision does not eliminate the need for a trial, but can be useful to limit and focus the issues to be tried. Many issues, however, can better be addressed after the facts are fully explored at trial. In considering a motion for summary decision, the decisionmaker—the ALJ or the Commission—must weigh the possible benefits from streamlining the trial against the value of a fully developed record in illuminating the issues.

Where, as here, the motion for partial summary decision addresses no distinct claims, but rather certain aspects of the notice of contemplated relief, the benefits of a partial summary decision will rarely outweigh the value of awaiting a fully developed record. Even if particular items of proposed relief are eliminated, that will not ordinarily have the effect of significantly limiting the factual issues for trial. For example, in the present case, the factual issues raised by the charges in the complaint would not appear to be substantially narrowed even if the requested partial summary decision were granted. To be sure, it may be possible to isolate some narrow factual issues relating solely to the elements of contemplated relief challenged by the developer respondents, but those relief elements appear to be factually intertwined with the violation charges set forth in the complaint. This conclusion is consistent with the ALJ's order certifying this appeal, since the ALJ appears to have accepted complaint counsel's argument that, even if a partial summary decision were granted, proof of the value of the land would be a principal issue in the case. (Order of Nov. 26, 1980 at 4.)

More important is the fact that relief issues are particularly difficult to resolve in isolation, without consideration of the factual context in which they arise. In construing the Commission's remedial authority, the guiding principle is that "where the problem lies within the purview of the [Commission] * * * , Congress must have intended to give it authority to deal with the evil at hand." *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 295, 312 (1963). See *Warner Lambert Co.* v. *FTC,* 562 F.2d 749, 756 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). At the present time, the Commission does not know what, if any, evil is at hand in this case, and the authority required to deal with it cannot be finally determined until completion of this proceeding and review of the full record by the Commission. As the notice of contemplated relief plainly states, at this point the Commission is committed only to

ordering "such relief as is supported by the record and is necessary and appropriate * * *." The difficulty and importance of the issues raised by the developer respondents counsel against premature resolution. The Commission prefers to consider what, if any, relief is appropriate before it considers the outer limits of its authority to grant relief.

The Commission's concern that it is premature to address the relief issues posed by the developer respondents is not overcome by respondents' reliance upon *Heater* v. *FTC, supra.* In *Heater* the Commission determined that Heater and a number of corporations he controlled had made a variety of misrepresentations in marketing a credit card program. *Universal Credit Acceptance Corp.,* 82 F.T.C. 570, 643–44 (1973). The Commission ordered restitution of monies collected through the use of the misrepresentations, stating that its goal was "to restore the competitive balance which existed prior to his illegal practices" (*id.* at 652) and to deter future fraudulent and deceptive conduct by depriving Heater of the fruits of his past conduct. *Id.* at 563. On review, the court of appeals held that "[t]he construction placed by the Commission upon its power to define and prohibit 'an unfair act or practice' would, if accepted, operate to invest the Commission with remedial powers which are inconsistent and at variance with the overall purpose and design of the Act. In particular, it would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview." However, the Court also conceded that the Commission "has power, in order to remedy the continuing effect of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal." *Id.* at 324 n.13. See also *FTC* v. *Virginia Homes Mfg. Corp.,* 509 F. Supp. 51, 55 n.2 (D. Md. 1980), *aff'd,* No. 81–1187 (4th Cir. July 14, 1981) (*per curiam*).

As complaint counsel point out, the Commission has not acquiesced in the reasoning of *Heater.*[1] But even if the *Heater* analysis were accepted, it is not entirely clear, without a complete factual record, precisely how that analysis would apply to the instant proceeding. For example, the complaint raises charges of continuing deception in an ongoing transaction between the developer respondents and land purchasers—allegations which if proven, may significantly distinguish this case from *Heater.*[2] Under the circum-

[1] The developer respondents also rely on *Congoleum Indus., Inc.* v. *CPSC,* 602 F.2d 220 (9th Cir. 1979). This case was decided by the same court that issued the *Heater* opinion and rested on the *Heater* precedent. It therefore contributes little to respondents' argument.

[2] *Holiday Magic, Inc.* 85 F.T.C. 90 (1975), is not inconsistent with the result here. In that case, the Commission

(Continued)

stances, the Commission concludes that a partial summary decision is not appropriate.

III.

The developer respondents also contend that the elements of the notice of contemplated relief that they challenge are foreclosed by principles of collateral estoppel, based upon the district court's decision on the Commission's request for a preliminary injunction in *FTC* v. *Southwest Sunsites, Inc., supra.* As a preliminary matter, the Commission notes that the decision is presently on appeal, and that a reversal by the court of appeals would obviate any preclusive effect of the district court's decision. See *Prager* v. *El Paso Nat'l Bank,* 417 F.2d 1111, 1112 (5th Cir. 1969). The developer respondents argue that the pendency of the appeal does not affect the preclusive effect of the district court's decision, so long as that decision stands. The Commission does not accept that proposition, at least as respondents would have it apply to this case in its present posture. It would not be a sensible rule of administration to grant a partial summary decision before the appeal is decided.

In any event, the developer respondents' contention is without merit. The proceeding before the district court was a proceeding for a preliminary injunction pursuant to 15 U.S.C. 53(b). The district court was not empowered to decide the merits of the administrative proceeding, but merely issues relating to preliminary relief. See *FTC* v. *Food Town Stores, Inc.,* 539 F.2d 1339, 1342 (4th Cir. 1976). In cases arising under the analogous provisions of the National Labor Relations Act, 29 U.S.C. 160(1), it is well settled that determinations by the district court in a preliminary injunction proceeding do "not foreclose a proceeding on the merits * * *." *NLRB* v *Denver Bldg. & Const. Trade Council,* 341 U.S. 675, 683 (1951). As the District of Columbia Circuit explained in the same case:

> Since two remedies are provided in the statute for the purpose of accomplishing two separate though related purposes of Congress, one in the District Court of a preliminary or interlocutory character, the other before the Board and reviewing courts, of a final character, the separate means designed by Congress for the accomplishment of these purposes must not be permitted to impair the freedom and effectiveness of either.

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had issued a final order which included a restitution provision, and review of the order had been sought in the Ninth Circuit. Concluding that it was not "privileged to disregard judicial precedent of such recent and clearly dispositive vintage" (*id.* at 91), the Commission, *sua sponte,* reopened the proceeding and struck the provision for restitutionary relief from the order. In this case, for reasons set forth above, the Commission is not prepared at this time to determine whether, or to what extent, *Heater* would be dispositive as to the elements of the notice of contemplated relief challenged by the developer respondents.

Denver Bldg. & Const. Trades Council v. *NLRB,* 186 F.2d 326, 331 (D.C. Cir. 1950). Accord, *Walsh* v. *International Longshoreman's Ass'n,* 488 F. Supp. 524, 528 (D. Mass. 1980) (because preliminary injunction proceedings are "merely ancillary to and in aid of the Board's jurisdiction, *res judicata* and collateral estoppel should not apply"). The Commission believes that the same rule, for the same reasons, is applicable to preliminary injunction proceedings under Section 13(b).

It is, therefore, ordered, That the Administrative Law Judge's order denying the developer respondents' motion for partial summary decision be, and hereby is, affirmed.

IN THE MATTER OF

RSR CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8959. Order, Dec. 2, 1976—Modifying Order, Nov. 13, 1981

This order reopens the proceeding and modifies the Commission's order issued on December 2, 1976 (42 F.R. 4; 88 F.T.C. 800), so as to relieve respondent of the obligation of divesting the lead recycling plants specified in the original order, since no purchaser(s) could be found. Among other things, the modified order requires respondent to timely divest or auction at no minimum price all the assets and properties (with certain specified exceptions) constituting the lead recycling plants in Dallas, Texas and Seattle, Washington; and offer to license all of its patented sulphur removal and battery recycling process to a qualified purchaser(s).

ORDER MODIFYING ORDER TO DIVEST AND TO CEASE AND DESIST

On April 17, 1981, respondent RSR Corporation filed a "Petition for Relief From Divestiture Order," seeking to be relieved of its obligation to divest Quemetco, Inc. on the ground that it has been unable to find an acquirer for Quemetco's lead recycling plants at any price. Based upon respondent's petition, supplemental information submitted by respondent, and other information available to it, the Commission has determined that it is in the public interest to reopen and modify the order in this case. The Commission also has considered a draft agreement between its staff and respondent concerning modification of the order and has determined that the agreed-to modification is in the public interest.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That Paragraphs I, II and VII of the Final Order to divest and to cease and desist issued by the Commission on December 2, 1976 be, and they hereby are, modified to read as follows:

I.

It is ordered, That Respondent, RSR Corporation (hereinafter "RSR"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other

property of whatever description that comprise the lead recycling plants owned by RSR subsidiaries in Dallas, Texas and Seattle, Washington, except as listed in Appendix A hereto. The plants may be divested either as a unit or separately. In the event that divestiture is not accomplished by other means, RSR must auction the plants, at no minimum price, to an acquirer or acquirers who represent that the plants will be used as lead recycling plants. The divestiture required by this Paragraph shall be absolute, shall be accomplished no later than one (1) year from the date when this modified order shall become final, and shall be subject to the prior approval of the Federal Trade Commission.

II.

It is further ordered, That such divestiture shall be accomplished absolutely and in good faith to an acquirer or acquirers approved in advance by the Federal Trade Commission so as to transfer the plants as operable and viable plants engaged in the production of recycled bulk lead, lead alloys and lead products. RSR shall grant to the acquirer or acquirers of the plants ordered to be divested under this order, at the option of such acquirer or acquirers, a non-exclusive license, subject to a reasonable royalty not to exceed 2%, to all of RSR's patented sulphur removal and battery recycling processes; *provided, however,* that in the event the acquirer of either of the plants to be divested is a battery manufacturer RSR shall only be required to grant such patent licenses to such an acquirer for use at the acquired plant; and *further provided* that RSR is not required to grant such licenses to an acquirer that is a primary lead producer.

VII.

It is further ordered, That within thirty (30) days from the effective date of this modified order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this modified order, RSR shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by RSR to make public its desire to divest the Dallas, Texas and Seattle, Washington plants, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and

(d) copies of all reports, internal memoranda, offers, counter-offers, communications and correspondence concerning said divestiture.

Appendix A

ASSETS NOT REQUIRED TO BE DIVESTED

1. All assets and liabilities related to Bestolife Corporation.
2. Undeveloped land near the 26 acres of the Dallas, Texas plant property.
3. Inventory, including obligations by RSR or its subsidiaries to return such inventory under tolling contracts, and also including raw materials, work in process and finished goods.
4. Accounts receivable.
5. Accounts payable.
6. Cash.
7. Books and records, other than books and records relating to production.

IN THE MATTER OF

THE GILLETTE COMPANY

Docket 9152. Interlocutory Order, Dec. 1, 1981

Granting complaint counsel's motion for review of ALJ's order.

ORDER UPON APPLICATION FOR INTERLOCUTORY REVIEW

This matter is before the Commission on Complaint Counsel's Application For Review Of The Order Granting Discovery Of Commission Records, filed August 17, 1981,[1] ("Complaint Counsel's Application") and Respondent's Answer In Opposition To Complaint Counsel's Application For Interlocutory Appeal, filed August 27, 1981 ("Respondent's Answer").

I. Appropriateness of Interlocutory Review

As the Commission has frequently stated, we generally disfavor interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings. *See, e.g., Bristol-Myers Co.*, 90 F.T.C. 273 (1977). The Commission believes that routine review of such rulings would substantially delay adjudicative proceedings. Moreover, resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ. Section 3.23 of the Commission's Rules of Practice ("Section 3.23") reflects both of these policy decisions; however, it also recognizes that special circumstances may require narrow exceptions to this rule.

Section 3.23(a)(1) provides for discretionary Commission review of an ALJ's order which "requires the disclosure of records of the Commission . . . if such appeal is based solely on a claim of privilege." In this case the requirements of the Rule are technically fulfilled as the ALJ's Order requires disclosure of Commission records and Complaint Counsel's Application is based solely on claims of privilege. The Commission has determined that this matter is appropriately before it on review, not only because the requirements of the Rule are met, but also because the issues raised by Complaint Counsel's Application recur in our proceedings with some frequency.

Respondent requested that, in the event that the Commission entertained this appeal, it be permitted to file a brief and present

[1] The order entitled, Order Ruling on Respondent's Motion For Subpoena *Duces Tecum* Directed To The Federal Trade Commission ("ALJ Order"), was issued on August 11, 1981, by Administrative Law Judge Miles J. Brown.

oral argument on the merits. Section 3.23(a), however, makes further briefing a matter of discretion. In this instance, the Commission believes that counsel on both sides have ably addressed the merits of a narrow set of issues in their briefs before the ALJ and the Commission. Therefore, we do not believe that the delay attendant to the filing of further briefs and additional oral argument is necessary and we proceed to a discussion of the merits of this appeal.

II. Discovery of Names of Informants

The ALJ's Order requires complaint counsel to reveal the names of all nonparties that were contacted in connection with the investigation or preparation of this case. ALJ Order at 2. The ALJ's Order also limits the availability of the informant's privilege only to complainants or to those who complaint counsel can show will be "prejudiced in their future business relations with Gillette." ALJ Order at 2.[2] Complaint counsel argues that the names of all persons contacted during its investigation and pretrial preparation are subject to the informant's privilege. Moreover, complaint counsel asserts that respondent failed to meet its burden to show a need for the names that outweighs the policy behind the informant's privilege. Complaint Counsel's Application at 3–4. The Reply of Respondent The Gillette Company to Complaint Counsel's Answer to Respondent's Motion for Subpoena *Duces Tecum* Directed to the Federal Trade Commission, filed on August, 1981, ("Respondent's Reply") states only that "respondent's need for the identities of those interviewed outweighs the interest of the free flow of information." Respondent's Reply at 7–8. Respondent, however, subsequently filed a supplemental affidavit with the ALJ that it now relies on to demonstrate its "need" for the names of the informants. Respondent's Answer at 5.

It is well established that the government may refuse to disclose the identity of its informants at trial. *See McCray* v. *Illinois,* 386 U.S. 300 (1967). The rationale for this privilege was described in *Roviaro* v. *United States,* 353 U.S. 53 (1957).

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. 353 U.S. at 59.

See also Graber Manufacturing Company, Inc., 68 F.T.C. 1235 (1965)

[2] Although not manifestly limited, this description is treated by both complaint counsel and respondent as encompassing only retailers of Gillette products contacted by complaint counsel.

citing *United States* v. *Deere & Co.,* 9 F.R.D. 523, 527 (D. Minn. 1949). However, the privilege is not applicable unless the information supplied relates to the commission of an unlawful act or is of a nature that would reasonably be expected to precipitate reprisals if it were revealed. *See Wirtz* v. *B. A. C. Steel Products, Inc.,* 312 F.2d 14, 16 (4th Cir. 1962), *United States* v. *Swift & Company,* 24 F.R.D. 280 (N.D. Ill. 1959). Nor is the privilege absolute. *See Roviaro* v. *United States, supra* at 60–61. The burden of overcoming the privilege, however, falls squarely on the party requesting disclosure. Thus the grounds on which disclosure is sought must be clearly articulated. *See United States* v. *Russ,* 362 F.2d 843 (2d Cir.), *cert. denied,* 385 U.S. 923 (1966); *United States* v. *Coke,* 339 F.2d 183 (2d Cir. 1964). A simple request by the moving party for disclosure is not enough to meet this burden. *United States* v. *Mainello,* 345 F. Supp. 863, 881–82 (E.D.N.Y. 1972).

Although the issue of protecting the identity of an informer usually arises in the context of criminal cases, the privilege is also applicable in civil cases. *See Westinghouse Electric Corp.* v. *City of Burlington,* 351 F.2d 762 (1965), *on remand City of Burlington* v. *Westinghouse Electric Corp.,* 246 F. Supp. 839 (D.D.C. 1965); *Mitchell* v. *Roma,* 265 F.2d 633 (3d Cir. 1959). The District Court in *Westinghouse Electric,* a private antitrust case, stated, ". . . The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure is essential to a fair determination of a cause." 246 F. Supp. at 769.

The ultimate determination of whether the informant's privilege is applicable in a given factual context depends on a balancing of two considerations: the public interest in protecting the information at issue and the moving party's need for that information in order to prepare a defense. As stated in *Roviaro* v. *United States, supra:*

> . . . Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. 353 U.S. at 62.

The extent of the informant's participation in the events at issue is critical to finding disclosure necessary. *See Roviaro* v. *United States, supra; United States* v. *Lloyd,* 400 F.2d 414, 415–16 (6th Cir. 1968); *Portomene* v. *United States,* 221 F.2d 582, 583–84 (5th Cir. 1955). The materiality of the informant's testimony to the disputed substantive issues is also highly relevant. *See Encinas-Sierras* v. *United States,* 401 F.2d 228 (9th Cir. 1968); *United States* v. *Franzese,* 392 F.2d 954 (2d Cir. 1968), *vacated per curiam in other grounds sub nom.*

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Giordano v. *United States,* 394 U.S. 310 (1969). Furthermore, the necessity for revealing the informant's identity may also depend on the stage at which discovery is sought. *See McCray* v. *Illinois, supra* at 307. In *United States* v. *Aluminium Limited,* 268 F. Supp. 758 (D.N.J. 1966), an antitrust case, defendant sought discovery of all names of persons contacted by the government. In that case, the District Court denied disclosure stating:

> . . . a defendant is not entitled to every bit of disclosure which he feels would be helpful . . . [A]lthough the information sought may be helpful . . . it may still not be essential to a fair opportunity for defendant's trial preparation. And if it is not essential his interests will not overcome the privilege. *Mitchell* v. *Roma,* 265 F.2d 633, 636 (3rd Cir. 1959). 268 F. Supp. at 762.

Respondent implies that it would not need all of complaint counsel's contacts in an ordinary Section 2(d) case, but the theory of this case calls for unusual case preparation. Respondent's Answer at 6, footnote. However, respondent has not demonstrated nor has it specified how it plans to use the names of the individuals contacted by complaint counsel. It is clear that this need must be examined and weighed, in the first instance by the ALJ.

In this case, the Commission believes that the ALJ failed to make an explicit inquiry into the facts that would militate either in favor of overcoming or retaining the privilege. Moreover, the ALJ's Order did not provide a basis for satisfying Section 3.36, which requires a specific showing that the material sought cannot be reasonably obtained by other means. Therefore, that part of the ALJ's Order that deals with the informant's privilege is reversed and remanded to the ALJ to conduct a factual inquiry and make findings consistent with this Order.[3]

III. Discovery of Reports of Interview

Complaint Counsel's Applicaton also seeks reversal of the directive in the ALJ's Order that compels production of "the factual content of any interview report on such contact prepared by complaint

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[3] The Commission believes that the type of hearing contemplated by the Supreme Court in its proposed Rule of Evidence 510 is an appropriate procedural model. Although this proposal ultimately was not adopted by Congress it, nevertheless, should be accorded considerable weight. Section 510(c)(2) of the proposed rule stated:

> If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination . . . of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit . . . Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera,* at which no counsel or party shall be permitted to be present.

See generally 2 Weinstein, *Evidence,* Section 510–1–7, Section 510 [05] (1980).

counsel." ALJ Order at 2. Complaint counsel argues that production of the interview reports would disclose the names of informants[4] as well as the contents of the communications without regard for the informant's privilege and work product privilege.[5] Respondent argues that the informant's privilege and work product privilege are not applicable to the reports of interview since respondent has met its burden of showing a substantial need for the information.

Section 3.31(b)(3) provides for two layers of protection for materials sought in discovery by a party which were "prepared in anticipation of litigation or for hearing by or for another party." It requires that the ALJ "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party."[6] However, the Rule also protects all work product against disclosure, absent a showing of "substantial need of the materials in the preparation of [the requesting party's] case," and a further showing "that he is unable without undue hardship to obtain the substantial equivalent of the material by other means."

The ALJ's Order makes no specific reference to the requirements of Section 3.31(b)(3) nor any explanation of how the requirements of that Rule or the established requirements of the work product privilege are satisfied by respondent's arguments. Furthermore, there is no indication that the ALJ weighed respondent's need for the information against the presumption that interview reports are privileged as work product. Rather, the ALJ simply held that, "Respondent is entitled to know the evidentiary substance of the Commission's investigation, including the documents which complaint counsel intend to offer into evidence as well as the documents which they do not intend to offer." ALJ Order at 1–2. Having reached this conclusion, the ALJ went on find that complaint counsel's files were the only available source of this information.

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[4] We believe that the names of potential witnesses in and of themselves are not ordinarily work product as contemplated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947). Therefore, discovery of the names is privileged, if at all, only under the informant's privilege.

[5] Although the subpoena in question seeks reports of interviews with those who may be regarded as potential witnesses for complaint counsel in this proceeding, we are not concerned here with the application of the Jencks Act principle. *See U.S. Life Credit Corp.*, 91 F.T.C. 984 (1978). That principle supports production of complaint counsel's interview reports, if at all, only after a witness has actually testified, in order to aid cross-examination. *Inter-State Builders, Inc.*, 69 F.T.C. 1152, 1165–67 (1966). It also requires the strict application of criteria intended to ensure that the reports or statements sought are accurate and complete. *U.S. Life, supra*, at 1038–39. Neither the appropriate circumstances nor the requisite showings are presented here for the application of this principle, nor has respondent sought its application.

[6] This provision is not at issue here, since the ALJ has authorized excision of such material. ALJ Order at 2. We note, however, a presumably inadvertent variance between the ALJ's formulation and that of the rule, in that the Order speaks of excision of "legal opinions" ragher than simply "opinions." We also note that the Commission has previously indicated that interview reports may be entitled to protection under this "inner core" provision. *See Inter-State Builders, supra* at 1164. *See also Hickman* v. *Taylor, supra.* In view of our holding here, we deem it unnecessary to reach this question in the present context.

Second, we believe that the ALJ failed to articulate the appropriate legal standard and factual basis for reaching his conclusion regarding the reports of interview. As was stated in *Hickman* v. *Taylor, supra,* there must be ". . . a proper showing of the necessity for the production of any of this material or [a] demonstration that denial of production would cause hardship or injustice." 329 U.S. at 509. *See also Allied Chemical Corp.,* 75 F.T.C. 1055, 1057 (1969). There is no doubt that respondent may have a need for information relating to complaint counsel's case; however, discovery of the results of complaint counsel's investigation is not a "need" nor a right recognized by our rules or that of any other authority of which we are aware. In the orderly course of preparation for trial respondent will obtain witness and exhibit lists and can interview or depose intended witnesses to fully explore complaint counsel's contentions.[7] Therefore, recognizing a categorical "need" for all information gathered during the investigation, without a showing, of "substantial need," would directly contradict the purpose of Section 3.31(b)(3), as well as the carefully defined limits of the Jencks Act principle. At best, respondent's strongest argument is merely one of convenience. *See Bell & Howell Co.,* Docket No. C–9099 (Order of April 11, 1978). This rationale, however, does not meet the "substantial need" test that has been long established as the cornerstone of the work product privilege. Indeed, as Justice Jackson stated in his concurring opinion in *Hickman* v. *Taylor, supra,*

> Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. 329 U.S. at 516

It is therefore ordered, That, upon consideration of the pleadings submitted by complaint counsel and respondent, complaint counsel's application for review be granted.

It is further ordered, That the Administrative Law Judge's August 11, 1981, Order be *Reversed* and *Remanded.*

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[7] Indeed, the ALJ's Order specifically contemplates such further discovery; however, it states, "Return on these specifications would be premature [at this time]." ALJ Order at 2.

IN THE MATTER OF

GODFREY COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C–3066. Order, May 14, 1981—Modifying Order, Dec. 3, 1981

This order reopens the proceeding and modifies the Commission's order issued on May 14, 1981 (46 F.R. 29458; 97 F.T.C. 457), by modifying Paragraph I(G) of the Order to relieve respondent from the obligation of divesting a specified retail grocery store.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED MAY 14, 1981

The Federal Trade Commission having considered respondent Godfrey Company's petition filed on August 5, 1981 to reopen this matter and to modify the consent order to cease and desist issued by the Commission on May 14, 1981, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

(G) The "disposition stores" means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G–427 (3045 S. 13th St., Milwaukee, WI.)
2. G–607 (6077 S. Packard Ave., Cudahy, WI.)
3. G–810 (3939 S. 76th St., Milwaukee, WI.)
4. J–1201 (1201 N. 35th St., Milwaukee, WI.)
5. J–729 (719 S. Layton Blvd., Milwaukee, WI.)
6. J–15182 (N81 W. 15182 Appleton Ave., Menomonee Falls, WI.).

IN THE MATTER OF

GROLIER INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8879. Order, March 13, 1978—Modifying Order, Dec. 10, 1981

This order reopens the proceeding and modifies the Commission's order issued on March 13, 1978 (91 F.T.C. 315; 43 F.R. 18652), by changing the disclosure requirements contained in Paragraphs II(A), (B), (D), and (E), so as to give respondents a choice of several approved methods of making required disclosures in advising those who reply to respondents' solicitations that they may be contacted directly by a salesperson; and allows sales personnel to present a business card containing prescribed information when making a sales visit.

ORDER MODIFYING CEASE AND DESIST ORDER

On August 13, 1981, the Commission issued an order denying respondents' motion to disqualify the Administrative Law Judge who rendered the Initial Decision in this proceeding. In its order, the Commission also invited the parties in this matter to file before the Commission their views as to whether the original Final Order of the Commission, 91 F.T.C. 315 (1978), should be modified to conform to the modified order in *Encyclopaedia Britannica,* 96 F.T.C. 778 (1980).

On September 30, 1981, respondents filed a response to the Commission's order. In this submission, respondents first proposed modifying the *Grolier* order to incorporate modifications made in *Britannica* on October 28, 1980. Second, respondents asked for guarantees that any future modifications in *Britannica* also be granted to respondents here. Third, respondents moved that the instant proceeding be stayed until the Commission takes action on a pending motion for further modifications in the *Britannica* order. Finally, respondents also seek a stay on the ground that a trade regulation rulemaking, rather than an adjudication, is the appropriate manner to conduct further proceedings involving Grolier.

Complaint counsel, on October 14, 1981, filed its answer to respondents' submission, pursuant to the August 13 order. Complaint counsel do not oppose modification of the *Grolier* order to conform with modifications already made in *Britannica.* But, they oppose any assurances of future modifications on the ground that in the event of such modifications, the Commission's rules afford Grolier an appropriate procedural vehicle, Rule 2.51(b), by which Grolier may petition for further modifications in its order. An

assessment of whether further modifications should be made in either of the orders in question depends on facts and circumstances particular to the acts and practices of each company. Complaint counsel also oppose granting any stay in order to facilitate a conversion of this adjudication to a rulemaking proceeding.

The Commission agrees with the parties that the modifications in the *Britannica* order granted on October 28, 1980, should now be granted to Grolier. However, the Commission believes that the issue of further modifications in *Britannica* cannot now be resolved with respect to these respondents because the request for further modifications that Britannica made (and which we will allow Grolier to make) depends upon experience in complying with the first modification. See paragraphs 2 and 3, *infra.* Britannica has had this experience, but Grolier has not.[1] Moreover, Grolier has available to it a right to petition the Commission for reopening the *Grolier* matter should any further modifications in *Britannica* justify similar treatment of Grolier. Therefore, a stay of this matter pending further events in *Britannica* would be inappropriate.

Nor does the Commission believe a stay is justified pending resolution of this matter by an industrywide rulemaking proceeding. Respondents rely on *Ford Motor Co.* v. *FTC,* 654 F.2d 599 (9th Cir. 1981) for the proposition that rulemaking is preferable to adjudication where the Commission is attempting to change existing law or to establish rules of widespread application. In this matter the Commission did not engage in any novel interpretation of existing law as the court of appeals believed occurred in *Ford Motor Co.,* but rather the Commission declared practices to be unlawful that were established as violations of Section 5 of the FTC Act over a decade ago, see, e.g., *P.F. Collier & Son Corp.* v. *F.T.C.,* 427 F.2d 261 (6th Cir.), *cert. denied* 400 U.S. 926 (1970). It is true that issues of relief involving affirmative disclosures distinguish *Grolier* from earlier cases, but the crafting of relief is particular to the facts and circumstances of each case. In this instance, affirmative disclosures were ordered because of the Commission's experience that mere cease and desist order provisions were inadequate to remedy the abuses found to be in violation of Section 5, practices that had persisted over time, despite earlier prohibitive relief. *Grolier, Inc.,* 91 F.T.C. 315, 437, n.98. In this regard, the Seventh Circuit held, in a related case, that rulemaking was not required to replace adjudication where relief differed because "[a] prior insufficient order does

[1] Grolier's argument that it would be at a competitive disadvantage if the Commission does not now assure Grolier it will receive all future modifications granted in *Britannica* is disingenuous. As matters now stand, Britannica is bound by our order while Grolier is not. Grolier has offered no evidence that it is voluntarily complying with our order and until it does comply it probably has a competitive advantage.

not necessitate the insufficiency of all later orders." *Encyclopaedia Britannica, Inc.* v. *FTC,* 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied,* 445 U.S. 934 (1980).

Therefore, it is ordered, That Paragraphs II(A), (B), (D), and (E) of the Order issued in this docket on March 13, 1978, shall be modified as follows:

1. Paragraph II(A) shall read:

A. Disseminating or causing to be disseminated any advertisement or promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information, unless any such solicitation clearly and conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products, using one of the following disclosures:

1. IMPORTANT: This card will let you know of my interest and enable your [location designation, if appropriate] sales representatives to

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)
on how I may (purchase) [applicable product].
(buy)

2. IMPORTANT: Returning this card allows me to have your [location designation, if appropriate] sales representative to

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)
on how I may (purchase) [applicable product].
(buy)

3. IMPORTANT: Returning this card will enable your [location designation, if appropriate] sales representative to

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)
on how I may (purchase) [applicable product].
(buy)

Upon prior approval in writing of the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection, or his designee, respondents may use any other disclosure that clearly and

conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products. A request for approval shall be in writing and shall be deemed granted if not disapproved within 30 days after receipt by the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection.

2. Paragraph II(B) shall read:

B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II(A) above, unless one of the disclosures set forth in such Paragraph, or a disclosure approved by the Assistant Director of the Division of Compliance or his designee as satisfying the requirements of Paragraph II(A), clearly and conspicuously appears in immediate proximity to the space provided for a signature or other identification of the responding party. During the one (1) year period from the date this Order becomes final, respondents may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that any proposed modifications of Paragraphs II(A) and II(B) will clearly and conspicuously disclose to potential purchasers of respondents' products that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products. The foregoing sentence shall not be construed as a limitation of respondents' submission of additional information regarding the request to reopen, including information relating to the financial impact of Paragraphs II(A) and II(B) on respondents. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

3. Paragraph II(D) shall be amended by adding the following proviso at the end thereof:

Provided, however, That for one (1) year from the date this Order becomes final, respondents may, in lieu of the card required by this Paragraph of the Order, substitute a business card of at least 2 inches by 3½ inches containing only the following information:

1. the name of the corporation

2. the name of the salesperson
3. the term "sales representative"
4. An address and telephone number at which the corporation or salesperson may be contacted
5. the product or the corporation logo or identifying mark.

During this one (1) year period, respondents shall comply in all other respects with the requirements of Paragraph II(D) above. Prior to the expiration of the aforesaid time period, respondents may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that the business card required in Paragraph II(D), as modified above, is effective in communicating to potential purchasers, prior to the entry into their homes or places of business by any of respondents' sales representatives, that the purpose of the sales representatives' call is to solicit the sale of respondents' products. The foregoing sentence shall not be construed as a limitation on respondents' submission of additional information regarding the request to reopen, including information on the financial impact of Paragraph II(D) on respondents. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. Respondents may continue to use the business card, as described by this proviso, during the time that a request to reopen these proceedings pursuant to this Paragraph is pending, and, if such proceedings are reopened, until the Commission determination of the matter has become final. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

4. Paragraph II(E) shall be amended by striking the words "to direct each such person to read the information contained on such card." The amended Paragraph shall read:

E. Failing to give the card, required by Paragraph II(D), above, to each person and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

It is further ordered, That the foregoing modifications shall become effective upon service of this Order.

It is further ordered, That in all other respects, respondents' other requests are denied.

IN THE MATTER OF

CREDIT CARD SERVICE CORPORATION

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8861. Final Order, Jan. 19, 1973—Modifying Order, Dec. 14, 1981

This order reopens the proceeding and modifies the Commission's order issued on January 19, 1973 (82 F.T.C. 191; 38 FR 5157) by updating the "IMPORTANT NOTICE" contained in Paragraph 5 of the order, to reflect revisions to Regulation Z, altering the conditions of cardholder liability.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On August 14, 1981, the respondents, whose principal service is notification to credit card issuers that a subscriber's credit cards have been lost or stolen, filed a request that the Commission reopen the proceeding in the above docketed matter for the purpose of: (1) eliminating paragraph 5 of the Order of January 19, 1973, which requires that the IMPORTANT NOTICE as set forth therein be incorporated verbatim in all written advertisements disseminated by the respondents; (2) substituting in its place only "a general disclosure that the cardholder's liability is limited to $50, but then only if the conditions imposed by Federal regulation are met by the card issuer"; and (3) deleting John P. Ferry as an individual respondent. Respondents also requested that the 30-day public comment period be waived.

By letter dated August 27, 1981, the Secretary informed the respondents that the Commission had denied their waiver request.

Paragraph 5 of the order reads as follows:

5. Failing to incorporate the following notice clearly and conspicuously in any written material offering the sale of respondents' credit card registration service to the public:

IMPORTANT NOTICE

Effective January 24, 1971, a Federal law provides that a cardholder has no liability for unauthorized use of his credit card unless all of the following four conditions are met. If the card issuing company (1) has notified you of your new limited liability, (2) has provided you with a pre-stamped envelope by which to notify them of a loss, (3) the card contains an approved method of identification, and (4) the use occurred before the card issuer is notified, then your liability is limited to $50 per card.

Respondents state that the IMPORTANT NOTICE is no longer "a

correct statement of the requirements for card issuers to impose the $50 liability"; that the continued imposition of a single notice can be misleading and confusing to the consumer and often contrary to the actual practices of the credit card issuer; and that the Truth in Lending Simplification and Reform Act and the amended Regulation Z have modified some of the conditions under which a cardholder can be held liable for unauthorized use. As an example, they mention the fact that card issuers are no longer required to provide pre-stamped envelopes for notice of loss or theft, but only "adequate notice" of the "means by which the card issuers may be notified of loss or theft of the card." Respondents also state that, since Regulation Z imposes the disclosure requirements on the card issuers, they should not be required any longer to include the IMPORTANT NOTICE in their advertising, especially in view of the fact that the respondents place "virtually no emphasis on risk of loss" in their advertising and in view of the fact that there are many other companies in the credit card registration business which are not required to include such a verbatim statement in their advertising.

Respondents contend that since they market their "credit card registration service primarily through joint promotions with banks, department stores, automobile rental companies, airlines, and other credit card issuers", and "since these joint promotions are generally made under the name of the card issuer, all advertising materials must be tailored to the particular practices of that card issuer", and that since "some credit card issuers continue to provide pre-stamped envelopes, others permit telephone notification, while still others require notification of loss or theft in written form . . . [as] permitted by amended Regulation Z, it is extremely difficult to draft language which would be accurate under all circumstances." They further contend that "as more and more credit card issuers begin to determine their own specific means for notification, the adoption of a single notice becomes all but impossible."

Finally, respondents request that John P. Ferry be dropped as the named individual respondent because he "is no longer the only shareholder" and because the company has been in full compliance with the Order for eight years.

On September 14, 1981, respondents filed a memorandum in support of their request to reopen proceeding and modify the order. They state that Credit Card Service Corporation is no longer wholly-owned by Mr. Ferry; that more than one-third of its stock is held by an employee trust and an additional 12 percent by outside shareholders; that Mr. Ferry is no longer the person responsible for the formulation of its advertising practices; that for the past 5 years the

corporate respondent has had a President who is the chief operating officer with responsibility for advertising; that Mr. Ferry has served as Chairman exercising only broad policymaking authority; and that Mr. Ferry "should no longer be individually subject to the terms of the Order" in view of the change of circumstances since 1973 when the Order was issued.

After the hearing in January 1972, the Administrative Law Judge found that Mr. Ferry . . . formulated, directed and controlled the acts and practices of the corporate respondent (82 F.T.C. at 196); and that he knew of the existence and effective date of the Truth in Lending Act amendment which set the $50 limit on liability for unauthorized use of lost or stolen credit cards (82 F.T.C. at 197) before he disseminated advertising with false, misleading and deceptive representations that cardholders would be liable for all goods and services obtained by unauthorized use of such cards and might suffer financial ruin (82 F.T.C. at 198, 202). We adopted these findings and the United States Court of Appeals for the District of Columbia Circuit affirmed our decision in its entirety on March 29, 1974. See 495 F.2d 1004. The evidence received in this matter fully supported the findings and the Order.

It is well settled that a corporation is not the only vehicle through which individuals, who have been personally involved in unlawful practices, may in the future continue to engage in such practices. *Tractor Training Service* v. *F.T.C.,* 227 F.2d 420, 425 (9th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956); *Consumer Sales Corp.* v. *F.T.C.,* 198 F.2d 404, 407–408 (2d Cir., 1952), *cert. denied,* 344 U.S. 912 (1953). Furthermore, it would seem incongruous to keep in force an order against the lifeless entity of a corporation, while exempting from its operation the living individual who was responsible for the illegal practices. See *Pati-Port, Inc.* v. *F.T.C.,* 313 F.2d 103, 105 (4th Cir. 1963).

Mr. Ferry owns more than 50% of the stock of Credit Card Service Corporation and is the Chairman of its Board of Directors. As such, he would be responsible for the acts and practices of the corporation. A claim of past and current compliance with the order raises only a collateral issue on the question of whether Mr. Ferry should no longer be named, and it is not determinative. The determining factor is the likelihood of resumption of the prohibited practices. We have not been convinced by respondents' arguments to the contrary.

Respondents have represented to us in their request to reopen that the absence of the IMPORTANT NOTICE statement would not be misleading since they place "virtually no emphasis on risk of loss" in their advertising. This assertion, however, seems to be at variance

with the respondents' advertising disseminated during September and/or October 1980 to the holders of Master Charge credit cards, serviced by the Bank of Virginia. The four page letter contains the IMPORTANT NOTICE at the bottom of the first page. It is preceded by these statements:

What would you do tomorrow if you suddenly discovered that your purse or wallet—with all of your credit cards—was missing? . . . Would you know how to protect yourself in a hurry? . . . How quickly could you find the phone numbers of each credit card company and locate the right people to talk to? I ask "How quickly" because you certainly don't want to wait until some criminal starts making dishonest purchases on your cards.

And it is followed by these statements:

The whole purpose of the Credit Card Service Bureau . . . is to safeguard credit cardholders from this kind of financial worry and emotional hassle . . . Last year alone, nearly *fifteen and a half million* credit cards were reported lost or stolen—and one in sixteen of these missing cards was used to make *fraudulent purchases averaging $410 per card*!

Other statements as to liability are interspersed throughout the letter such as:

2. . . . and you will avoid even one cent of liability for fraudulent purchases that are charged subsequently to your account.

Respondents' statement that the adoption of a single notice becomes all but impossible as more and more credit card issuers "determine their own specific means for notification" of the loss of credit cards, is a misstatement of the applicable law as interpreted by the Board of Governors of the Federal Reserve System. The method of notification of a lost or stolen credit card is not left to the whims of each card issuer. Section 226.12(3) of Regulation Z, as amended, provides that "Notification may be given, at the option of the person giving it, in person, by telephone, or in writing." Finally, we are of the opinion that allowing the respondents to design their own disclosure statement would be to invite renewal of the practices which led to entry of the order in the first place. Therefore we conclude that the IMPORTANT NOTICE should be retained.

In view of the changes in the law and in Regulation Z, the remaining issue is whether the proceeding should be reopened for the limited purpose of updating the IMPORTANT NOTICE. Since the Truth in Lending Act no longer requires that a credit card issuer provide a pre-stamped envelope to its subscribers for use in reporting the loss of the credit card, we hold that it is in the public interest to

reopen the proceeding and make the necessary changes in the IMPORTANT NOTICE to reflect the current law. Therefore:

It is ordered, That the proceeding in Docket 8861 be, and is hereby reopended; and

It is further ordered, That the IMPORTANT NOTICE of paragraph 5 of the order be rescinded and hereby replaced by the following:

IMPORTANT NOTICE

Federal law provides that a cardholder has no liability for unauthorized use of his or her credit card unless all of the following four conditions are met. If the card issuer (1) has notified you of your limited liability, (2) has provided you with adequate means to notify it of the credit card loss, (3) has provided a means of identifying the authorized user, and if (4) the unauthorized use occurred before the card issuer is notified, then your liability is limited to $50 per card.

It is further ordered, That the foregoing modification shall be effective upon service of this order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 18, 1982

Staying the effective date of the Initial Decision until January 15, 1982.

ORDER

On November 20, 1981, the Director of the Bureau of Competition ("Director") filed a Withdrawal of Notice of Intention to Appeal. Complaint counsel had previously filed its Notice of Intention to Appeal the Administrative Law Judge's ("ALJ") initial decision in this matter and had subsequently reaffirmed its contention that the public interest would be served by Commission review of the merits as recently as October 1, 1981. Therefore, the Commission issued an Order on December 3, 1981, that required complaint counsel to provide a "Statement as to why the public interest is no longer served by full Commission review and consideration of the substantive merits of this matter."

On December 11, 1981, the Director of the Bureau of Competition filed a statement with the Commission. The Bureau Director's statement expressly acknowledged that it is "the decision of the Commission which should ultimately govern here. . . ." Director's Statement at 2. The Commission concurs with this view. Section 5 of the Federal Trade Commission Act clearly provides that a determination as to the public interest, for the purpose of invoking this Act, rests solely within the discretion of the Commission.

The Bureau Director has articulated his belief that the theory of Docket 8883 is inconsistent with the public interest because it "unavoidably extends Section 5 to condemn some forms of conduct that rationally flow from an industry's structure, and thus, to condemn the structure itself." Director's Statement, at 3. Moreover, the Director states that the relief sought by complaint counsel would be anticompetitive, potentially resulting in inefficient behavior to the ultimate detriment of the consumer. Director's Statement at 3–4.

After reviewing the record materials, the Commission has determined to permit a brief period for further comment from those complaint attorneys and economists who have conducted this litigation. Chairman Miller opposes the extension of time and would not place this matter on the Commission's docket. He believes that the views of all parties have been clearly articulated in their briefs before the ALJ and the Commission. (See separate statement.) Commissioner Clanton also is not inclined to place this matter on the

Commission's docket. However, in light of the Bureau Director's statement noting the differing views of the complaint attorneys litigating this matter, he would support the Commission's action. Respondents may also wish to provide their views on the Bureau Director's statement or on the issue of whether the Commission should place this matter on its own docket for review. Therefore, in order to afford a complete opportunity for all the parties to express their views,

It is ordered, That the parties file any statements, not to exceed thirty pages, if desired, no later than fifteen days following the date of issuance of this order.

It is further ordered, That the effective date of the Initial Decision of the ALJ in this matter is hereby stayed until January 15, 1982, pending a determination of the issues raised by the pleadings.

It is so ordered.

Chairman Miller dissented.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III

On November 3, 1981, I joined my fellow Commissioners in denying respondents' petition to affirm the Adminstrative Law Judge's (ALJ's) decison without briefs to the Commission. My reasons, as stated at that time, were as follows. First, the granting of such a petition would have been unprecedented and inconsistent with the Commission's own rules of procedure. Second, the Commission had before it, at the time, a notice of intention to file an appeal on the part of complaint counsel. To have granted respondents' petition would have required the Commission simultaneously to anticipate and resolve the merits of the then-pending appeal.

On November 23, 1981, the Director of the Bureau of Competition withdrew, without comment, the Bureau's notice of intent to appeal. In the interest of collegial inquiry, on December 3 I joined my fellow Commissioners in delaying for 15 additional days the effective date of the ALJ's decision in order to give the Commission an opportunity to hear the Bureau Director's reasons why an appeal would not be in the public interest.

On December 11, the Bureau Director submitted his rationale to the Commission, stating, in part, that in his judgment the theory on which the case is based is not sound as a matter of law or public policy and could not prevail in the courts.

The circumstances now facing the Commission are as follows:

(1) The ALJ, after reviewing over 20,000 pages of evidence and argument, has concluded that, under the theory of the case argued

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by complaint counsel, the evidence is not sufficient to support a finding of a law violation.

(2) The Director of the Bureau of Competition has concluded that, even if the evidence were found to be sufficient, the theory does not support a finding of a law violation.

(3) The case has occupied the Commission's attention for nearly a decade (the original complaint having been issued in April of 1972).

(4) The case already has cost the Commission and the taxpayers $5.9 million, and has cost the respondent private parties and, indirectly, consumers of their products, millions more.

(5) Further delays in resolving the case are draining and will continue to drain resources from the Commission's other important work.

With respect to the question of the Commission's need to hear further arguments before deciding whether to take the case on appeal on its own motion, I would note that the Commission has had ample time to review the Bureau Director's rationale for withdrawing the Bureau's notice of intent to appeal, has had since September 1st to review the ALJ's decision, and has had over eighteen months to review complaint counsel's and respondents' briefs filed with the ALJ.

I think it time the Commission acted to bring a merciful end to this case, whose result, if successfully prosecuted, would more likely harm consumers than help them. I cannot in good conscience vote either to bring the matter before the Commission for formal review or to extend further the period for making that decision.

Enough is enough.

IN THE MATTER OF

WORTHINGTON FORD OF ALASKA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY AND FEDERAL TRADE COMMISSION ACTS

Docket C-3079. Complaint, Dec. 30, 1981—Decision, Dec. 30, 1981

This consent order requires four motor vehicle dealerships, located in various parts of the country, and their corporate officer, among other things, to make the text of written warranties readily available to prospective buyers, prior to sale; maintain up-to-date binders containing copies of written warranties in an easily accessible location; and conspicuously post signs advising consumers that all warranties are not the same and that written warranties are available for comparison upon request. Respondents are barred from improperly disclaiming, modifying or limiting the duration of implied warranties; and required to notify previous purchasers of motor vehicles whose implied warranty rights were improperly waived that they may have additional warranty protection. Each dealership must appoint an individual to be responsible for customer contacts resulting from the notice. Additionally, respondents are required to maintain specified records for a period of three years; instruct employees as to the requirements of the Magnuson-Moss Warranty Act; and institute a program of continuing surveillance to ensure compliance with the terms of the order.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Sandra S. Froman, Loeb and Loeb,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), the implementing Rule concerning the Availability of Written Warranty Terms ("Pre-Sale Rule") (16 C.F.R. 702 (1977)) duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc., Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, and Calvin Worthington, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have

violated the provisions of said Acts, and the Pre-Sale Rule, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The present tense as used herein includes the past tense.

PAR. 2. Respondent Worthington Ford of Alaska, Inc. ("Ford Alaska") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alaska with its principal office and place of business located at 1950 Gambell St., Anchorage, Alaska.

Respondent Worthington Chrysler-Plymouth, Inc. ("Chrysler-Plymouth California") is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Worthington Ford, Inc. ("Ford California") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Cal Worthington Dodge, Inc. ("Dodge Arizona") is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Calvin Worthington is an officer of said corporations. He generally formulates, directs and controls the policies, acts and practices of said corporations, and his address is Route 3, Box 3924, Orland, California.

PAR. 3. Respondents are or have been engaged in the advertising, offering for sale, and sale of new and used automobiles and trucks to the public.

PAR. 4. In the course and conduct of their business, respondents offer for sale and sell to consumers, consumer products distributed in commerce as "consumer product," "consumer," "distributed in commerce," and "commerce," are defined by Sections 101(1), 101(3), 101(13) and 101(14), respectively, of the Warranty Act. Respondents are, therfore, suppliers as "supplier" is defined by Section 101(4) of the Warranty Act.

PAR. 5. Respondents, in the course and conduct of their business have offered for sale and sold automobiles and other consumer products manufactured after July 4, 1975 costing the consumer in excess of $15.00, many of which are warranted by the manufacturer.

Respondents are, therefore, sellers as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

COUNT 1

PAR. 6. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. In connection with the offering for sale and sale of automobiles and other consumer products manufactured after January 1, 1977, respondents have failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of the written warranties offered in connection with such products available for prospective buyers' review prior to sale.

PAR. 8. Respondents' failure to comply with the Pre-Sale Rule as described in Paragraphs Six and Seven of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT 2

PAR. 9. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. In the course and conduct of their businesses, respondents Ford Alaska, Chrysler-Plymouth California, Ford California, and Calvin Worthington, sell service contracts to purchasers of new and used automobiles and trucks manufactured after July 4, 1975. Respondents have, with respect to those same purchasers, disclaimed all implied warranties (including the implied warranties of merchantability and fitness for a particular use) arising under state law and otherwise available to purchasers of respondents' automobiles and trucks.

PAR. 11. In the course and conduct of their business, respondents Dodge Arizona and Calvin Worthington sell service contracts to purchasers of used automobiles and trucks manufactured after July 4, 1975. Respondents have, with respect to those same purchasers, disclaimed all implied warranties (including the implied warranties of merchantability and fitness for a particular use) arising under state law and otherwise available to purchasers of respondent's automobiles and trucks.

PAR. 12. Respondents' disclaimer of the implied warranties as described in Paragraphs Ten and Eleven of this complaint is a violation of Section 108 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Worthington Ford of Alaska, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alaska with its principal office and place of business located at 1950 Gambell St., Anchorage, Alaska.

Respondent Worthington Chrysler-Plymouth, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Worthington Ford, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of California with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Cal Worthington Dodge, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Calvin Worthington is an officer of said corporations. He generally formulates, directs, and controls the policies, acts and practices of said corporations, and his address is Route 3, Box 3924, Orland, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I. *Definitions*

A. *Warranty Act* means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*).

B. *Service contract* means such contract as is defined in Section 101 (15 U.S.C. 2301) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*).

C. The definition of terms contained in Section 101 of the Warranty Act and in Rule 702 promulgated thereunder (16 C.F.R. 702.1) as presently defined and as may be amended hereafter, shall apply to the terms of this order.

D. *Trucks* means all trucks except those larger than one ton capacity.

E. *Truck parts* means all truck parts which are at any time used on trucks as defined in I.D.

II.

It is ordered, That respondents Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc. Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, their successors and assigns, and their officers, and Calvin Worthington, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale and sale of automobiles, trucks and truck parts, and other consumer products:

A. Shall make available for the prospective buyer's review, prior to sale, the text of each written warranty on new cars, new trucks, and other new consumer products costing the consumer more than $15, by use of one or more of the following means:

(1) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(2) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each showroom in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such showroom, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced by substituting superseding warranties and by adding new warranties as appropriate. The respondent shall either:

i. display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

ii. make the binder(s) available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the display area advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access; and/or

(3) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(4) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies,

Unless 16 C.F.R. 702.3(a)(1) is amended, in which case respondents shall comply with said regulation as amended.

B. Shall clearly and conspicuously display the text of each written warranty provided by respondents, or any of them, for used cars or trucks in a window of each warranted vehicle; *provided,* that in the event the Federal Trade Commission issues a final Trade Regulation Rule establishing requirements which make compliance

with this paragraph legally impossible, or which requires disclosure of warranty terms on window forms, then this paragraph will be null and void.

This Section II shall not apply to media advertising.

III.

It is further ordered, That:

A. Respondents post, in a prominent location in each showroom, a sign, at least 36 inches wide by 48 inches high and reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

Compare warranties before you buy

There is warranty information in this showroom

If you can't find it, ask for it

Check for these things:

What costs are covered?

What do *you* have to do?

Are all parts covered?

How long does the warranty last?

B. Any respondent who offers warranties on used automobiles or trucks, shall post, in each used vehicle sales lot, in a prominent location, in a position reasonably calculated to elicit a prospective used vehicle buyer's attention, a sign, at least 36 inches wide by 48 inches high which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

Compare warranties before you buy

Warranties (when given) are on the windows of used cars

If you don't see it, ask about it

Check for these things:

What costs are covered?

What do *you* have to do?

Are all parts covered?

How long does the warranty last?

C. The sign required by paragraphs III.A and III.B shall be posted for a period of not less than three years after service upon respondents of this order. The language in such sign shall be unencumbered by other written or visual matter, shall be spaced, indented and punctuated as indicated in paragraphs III.A and III.B above, and shall be printed in black against a solid white background, as follows:

1. The title of each sign shall be the work "Important" and shall be printed in capital letters in 4-inch boldface type followed by an exclamation mark.
2. The next phrase shall be printed on a separate line in capital letters and in 3-inch medium face type.
3. The next three phrases shall be printed on separate lines and in 3-inch medium face type.
4. Each succeeding phrase shall be printed on a separate line and in 2-inch medium face type.
5. The word "Important!" and each phrase shall be at least one inch from every other phrase.

IV.

It is further ordered, That respondents, in connection with the sale of automobiles, trucks and truck parts, and other consumer products in instances where respondents either make a written warranty to the consumer with respect to such consumer product, or, at the time of sale or within 90 days thereafter, enter into a service contract with the consumer which applies to such consumer product, shall:

A. Not disclaim or modify except as permitted by Section 108(b) of the Warranty Act, any implied warranty with respect to a consumer product;

B. Not limit the duration of any implied warranty with respect to a consumer product unless:

1. the written warranty is clearly and conspicuously designated a "Limited Warranty"; and

2. the limitation is for a period of time at least as long as the duration of any written warranty provided by respondents with respect to the product; and

3. the duration of the written warranty is for a reasonable duration; and

4. the limitation is conscionable, is set forth in clear and unmistakable language, and is prominently displayed on the face of the warranty.

V.

It is further ordered, That respondents shall:

A. Notify each consumer who purchased from respondents an automobile or truck manufactured after July 4, 1975, and who entered into a service contract with respondents at the time of sale, or within 90 days thereafter, or who received a warranty made by respondents and who executed either:

1. an offer to purchase which included language purporting to waive all implied warranties, or

2. a retail installment contract or security agreement which included language purporting to waive all implied warranties,

by mailing to each such consumer at the consumer's last residential address contained in the sales file folder, the notice set forth in the Appendix attached to this order. The Appendix may be sent by Worthington Ford, Inc. on behalf of Worthington Chrysler-Plymouth, Inc. and Cal Worthington Dodge, Inc. The address and telephone number of Worthington Ford of Alaska, Inc. shall be inserted in the appropriate blanks of the notices which are to be sent to customers of that dealership and the address and telephone number of Worthington Ford, Inc. shall be inserted in the appropriate blanks of the notices to be sent to all other customers of respondents.

If the notice is returned undelivered, the return envelope is to be retained and the notice shall be sent to the customer's last

employment address known to respondents or to the address of a co-signer, relative or other person through whom the customer may be reached.

B. Designate a responsible individual or individuals on behalf of each dealership and insert the name or names of the individual(s) for each dealership in the blank in the notice set forth in the Appendix, and provide written instructions to all dealership personnel who are normally in contact with the public and who have been regularly employed for seven (7) or more consecutive days, including, but not limited to, salesmen, service writers, office staff and service managers, directing them to refer all inquiries in response to the said notice to the designated individual(s). These written instructions shall also direct that said personnel shall not take any actions inconsistent with said notice to consumers.

C. Respond in writing to each oral or written communication received from consumers who were sent the notice contained in the Appendix to this order.

D. Not raise the defenses of disclaimer of implied warranty, or limitation or modification of implied warranty (except as permitted by Section 108(b) of the Warranty Act), in any correspondence, in any writing, or in any case or suit brought by consumers against respondents in connection with automobiles, trucks or truck parts, or other consumer products purchased from respondents if:

1. said products were manufactured after July 4, 1975; and either,
2. the consumer entered into a service contract with any of the respondents covering said product at the time of the sale or within 90 days thereafter; or
3. respondents made a written warranty to the consumer with respect to such consumer product.

E. Not raise the defense of lapse of statute of limitations with respect to any claim for the repair or replacement of an automobile, truck or truck part, or other consumer product purchased from respondents, based on breach of an implied warranty, in any correspondence, in any writing, or in any case or suit brought by consumers against respondents in connection with automobiles, trucks, or truck parts, if such claim is asserted by a consumer within six months from the date on which the notice set forth in the Appendix attached to this order is mailed, and if:

1. said product was manufactured after July 4, 1975; and either,
2. the consumer entered into a service contract with any of the

respondents covering said product at the time of the sale or within 90 days thereafter; or

3. respondents made a written warranty to the consumer with respect to such consumer product.

VI.

It is further ordered, That:

A. Respondents deliver a copy of this order to cease and desist to all of their present and future managerial employees and salespersons regularly employed for seven (7) or more consecutive days, and secure a signed statement acknowledging receipt of the order from each such person.

B. Respondents instruct all present and future employees, salespersons, agents, and other representatives of respondents, regularly employed for seven (7) or more consecutive days and engaged in the sale of automobiles or other consumer products on behalf of respondents, as to respondents' specific obligations and duties under the Warranty Act, all present and future implementing Rules promulgated under the Act and this order including but not limited to oral instruction accompanied by delivery to each of the above persons the most current Commission consumer education pamphlet on warranties on the following:

1. the availability and location of warranty information;
2. the nature of and differences among full warranties, limited warranties, and service contracts.

C. Respondents institute a program of continuing monitoring to reveal whether respondents and respondents' employees, salespersons, agents, and other representatives are in compliance with this order.

D. Respondents maintain complete records for a period of not less than three (3) years from the date of the incident, of any written information received which indicates the possibility of a violation of this order by any of respondents' employees, salespersons, agents, or other representatives.

E. Respondents maintain, for a period of not less than three (3) years after service upon them of this order, complete business records, including customer sale folders, relating to the manner and form of respondents' continuing compliance with all the terms and provisions of this order.

F. The records described in VI. D. and E. shall be available upon

request for inspection and copying by representatives of the Federal Trade Commission at respondents' place of business during normal business hours upon reasonable advance notice.

G. The corporate respondents named herein notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporate respondents which may affect compliance obligations arising out of this order.

H. For a period of five years after service upon him of this order, the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment relating to the sale of consumer goods or services and/or of his affiliation in a management or ownership capacity with a new business or employment relating to the sale of consumer goods or services.

I. Respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Appendix

[Name and Address of Consumer] [Date]

Dear [Name of Consumer]:

You may have some added warranty protection for your car or truck. When you bought your vehicle, there was a line on the back of the contract which said that you did not have any implied warranties under state law. This is not so. You do have these warranties, which are described below. Implied warranties only cover, however, the condition of the vehicle at the time it was purchased.

First, you have a warranty of "merchantability." This means the car or truck you purchased must have been fit for ordinary use. Second, you may have a warranty of "fitness for a particular purpose" if you bought your car or truck on the basis of any representation we might have made that the vehicle was fit for a *particular* purpose which is *different* from the ordinary purpose for which cars and trucks are used.

If you feel that you have a claim under one of these warranties, please contact us, preferably in writing, at (insert full address) and give us all the details.

If you wish to call us about any claims you may have, please call us at (insert full telephone number) and speak to _____ .

We will consider your claim and get back to you in writing as to what we are willing to do. We will not say that you have given up any implied warranty rights, nor will we tell you that you waited too long if you make your claim within 6 months of the date of this letter.

If you are not satisfied with our response, you may want to talk to the Federal Trade Commission in Seattle, Washington (Tel. (206) 442–4655).

However, we are not responsible for fixing any damage caused by normal wear and tear, by your misuse of the car or truck, by events beyond our control, or by your failure to properly care for your vehicle.

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Proposed trucking allowance program of food and grocery seller would not violate the Robinson-Patman Act or the Motor Carrier Act of 1980. [*813 7002, Procter & Gamble Co.*]

July 29, 1981

Dear Mr. Hemminger:

This is in response to your request, contained in your letters dated September 2, 1980, March 18, 1981, and April 16, 1981, on behalf of the Procter & Gamble Company (P & G), for an Advisory Opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. §§ 1.1-1.4(1980). Specifically, you set forth P & G's intention to offer customers, who elect to pick up certain P & G products at specified P & G shipping point plant locations, hauling allowances that would be deducted from P & G's uniform delivered price. The Commission understands that these allowances would be offered on certain P & G products on an experimental basis, rather than on every product sold by the company, although P & G intends that, if results of the experiment are favorable, it would expand the allowance program to other products. You have requested that the Commission advise you of the legality of instituting P & G's allowance program in relation to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13 (1970), and to Section 8 of the Motor Carrier Act of 1980, Pub. Law 96-296, 94 Stat. 798 (July 1, 1980) ("Section 8").

In reviewing your request, the Commission has concluded that Section 8 appears to be a limited exemption from the Robinson-Patman Act, as that statute was interpreted by the Commission in Advisory Opinion No. 147, 72 F.T.C. 1050 (1967) (digest). Section 8 appears to permit a limited class of sellers—"sellers of food and grocery products"—to engage in practices similar to those the Commission believed, in Advisory Opinion No. 147, might violate the Robinson-Patman Act. The Section 8 exemption applies, however, only if all of that statute's other requirements are met.[1]

The Commission has carefully reviewed your Request in light of the applicable statutes and has concluded that the allowance program P & G intends to institute would appear, based on the facts you have supplied in support thereof, to be consistent with the terms of

[1] Although Section 8 does not assign any enforcement responsibilities to the FTC, the Commission believes that it has authority to interpret Section 8 by virtue of its effect on the Robinson-Patman Act amendments to the Clayton Act, a statute which the Commission has the authority and obligation to enforce. 15 U.S.C. 21(a) (1970). The legislative history of Section 8 recognizes Congress' desire to have the Commission continue to enforce effectively the Robinson-Patman Act.

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the Section 8 exemption to the Robinson-Patman Act:

(1) P & G appears to be a "seller of food and grocery products" who will offer allowances with respect to "purchased food and grocery products." The products on which it intends to offer allowances—Downy and Bounce fabric softeners, Biz detergent, and Comet cleanser—are products sold primarily in grocery stores.

In this connection, the Commission would point out its view that P & G could fall outside the Section 8 exemption if it offered allowances otherwise conforming to that statute on products that are not sold primarily in grocery stores, notwithstanding the fact that in terms of other products, P & G is a "seller of food and grocery products." Allowances under Section 8 may be offered only with respect to "purchased food and grocery products."

(2) The allowances P & G intends to offer would appear "not to exceed" P & G's "actual cost" of delivery to a particular customer.

This conclusion is based solely on data supplied by P & G in support of its request, comparing proposed allowances and actual costs on a customer-by-customer basis, for customers in Illinois and the St. Louis metropolitan area. These data, for purposes of this conclusion, have been assumed to be true for these customers and, moreover, representative for all P & G customers wherever they are located. The Commission would caution that this conclusion is based solely on these assumptions. Should P & G offer allowances that in some cases *do* exceed the actual cost P & G would have incurred to deliver, such allowances, of course, would fall outside the scope of the Section 8 exemption. The Commission would add, however, in this connection, that P & G's plan to reevaluate the dollar value of its allowances as costs change over time appears consistent with Section 8.

(3) P & G's intended allowances would seem to be "available to all customers."

P & G has averred in its request and a subsequent submission that it intends to offer allowances to all customers, regardless of their retail trade identification as operators or suppliers of, *e.g.*, grocery stores, drug stores, general merchandise retail stores, and so forth. This would seem to be required by Section 8, the terms of which do not modify or limit the word "customer." This term, to be generally consistent with other laws administered by the Commission, simply

means any person who purchases from P & G for resale. Also, P & G's intention to "broadly announce" its allowances is helpful to meet Section 8's availability test.

(4) P & G's allowances, as calculated by uniform application of a formula under which the amount of allowance on identical quantities of products varies only by distance traveled by the customer, are "nondiscriminatory" in application, as that term is used in Section 8.

The Commission understands the term "nondiscriminatory" in Section 8 to mean, in part, that customers located the same distance from the shipping point ("similarly situated") should receive equal allowances, all other things being equal. The uniform application of P & G's single-mode allowance formula would appear to result in equal allowances for similarly situated customers.

In addition, the Commission would point out that P & G's intention to see to it that customers actually travel the distance they specify is consistent with Section 8's requirements that compensation be not in excess of actual cost and that compensation be on a nondiscriminatory basis. Sellers should be encouraged to engage in this type of oversight, so long as it, too, is conducted on a nondiscriminatory basis, to guard against overcompensation and the potential for discriminatory allowances to which some but not all customers would be entitled and which might be hidden in inflated customer reports of distance to be traveled.

Furthermore, P & G's intention to permit customers to designate one shipping point for pick up and another for calculation of the distance component of the allowance formula appears acceptable *only* if the resulting calculation is based upon the distance from the *closer* shipping point. P & G's program clearly would fall outside the Section 8 exemption if customers were permitted to pick up at a nearby location and receive an allowance calculated by reference to a more distant shipping point. Such a practice would appear to result in discriminatory allowances to certain customers and, moreover, might lead to the conclusion that P & G uses a "basing point" pricing system rather than a system of uniform delivered prices.

(5) P & G's plan to make pick-up allowances available on truckload quantity shipments does not appear to make those allowances "unavailable" to an identifiable class of customers of food and grocery products.

P & G intends not to permit customers to pick up or receive any allowances on less-than-truckload (LTL) quantity shipments. In support of this intention, P & G has presented information which tends to show that about 90% of its shipments at present are in truckload lots and, further, that the remaining 10% of LTL shipments arise from a variety of reasons, among them P & G's inability to fill a truckload order resulting in LTL shipments to customers who ordinarily purchase in truckload lots and a customer—who can otherwise purchase in truckloads—choosing to purchase LTL for its convenience. In addition, P & G has submitted its views that virtually all retail grocery stores are either operated by or supplied by grocery distribution centers (whether operated by retail grocery chains or independent grocery wholesalers or retailer-owned cooperative wholesalers) which have the ability to, and normally do, purchase in truckload quantities to obtain the best price and maintain optimum inventory levels and which, moreover, have the capability to take advantage of P & G's offer of truckload allowances.

For purposes of this Advisory Opinion, consistent with the Commission's Rules, the Commission is prepared to accept these assertions as given. Thus, these asserted facts form the basis for the Commission's belief that P & G's plan to limit allowances to truckload quantities is consistent with Section 8's requirement that compensation be made available to all customers on a nondiscriminatory basis. This conclusion might not hold true, however, if it appeared that an identifiable class of customers lacked the capability ever to purchase in truckload quantities.[2] Under those circumstances, some form of allowance might be required for LTL shipments to meet Section 8's "availability" test. The Commission expresses no view as to whether P & G's assumptions may be true outside the recognized food and grocery distribution industries.

Your letter with its attached exhibits requesting this Advisory Opinion has been placed on the Commission's public record, in accordance with Section 1.4 of the Commission's Rules, 16 C.F.R. § 1.4 (1980). Your separate request for continuing confidential treatment of Exhibit C of your Advisory Opinion request, pursuant to Rule 1.4, has been considered by the Commission. The Commission will not disclose Exhibit C without giving P & G ten days advance notice of intended disclosure, as required by Section 6(f) and Section 21(c) of the Federal Trade Commission Act, as amended, 15 U.S.C. 46(f), 57b-2(c).

By direction of the Commission.

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[2] See, for example, *Universal-Rundle Corp.*, 65 F.T.C. 924 (1964).

SEPARATE STATEMENT OF ACTING CHAIRMAN CLANTON

While I am in agreement with the Commission's advisory opinion letter to Procter & Gamble in most respects, there is one point of departure on which I believe that the majority's opinion should give additional guidance. The majority's letter defines "similarly situated customers" to include only those customers who are located equal geographical distances from the shipper's dock. While it is correct under a single-mode, mileage-based backhaul allowance formula that, in order to meet the non-discrimination criterion of Section 8, the amount of compensation for identical purchases by similarly situated customers should vary only by the distance from the seller's dock, I believe that our advice should go a step beyond this.

I would take this opportunity to acknowledge the possibility, without attempting to define the circumstances, that customers might be "similarly situated" in cost-related ways other than mere geographical distance and, conversely, that between equidistant customers clear cost differences based on actual experience may be established. Such cost-related circumstances might involve the historic use of different or multiple modes of transportation to different customers, so that a formula measuring only mileage from a seller's dock using single-mode rates may not truly reflect all the circumstances under which customer comparability could be achieved. In short, I believe the majority's letter can be read as saying that a single-mode, mileage-based backhaul allowance formula is the *only* system that a seller can use which will comply with the terms of Section 8, and I would disagree with such a narrow interpretation.

Letter of Request

September 2, 1980

Dear Sir:

This is a request for an Advisory Opinion pursuant to Sections 1.1-1.4 of the Commission's Rules on behalf of The Procter & Gamble Distributing Company, Cincinnati, Ohio (hereinafter referred to as "Company").

Set forth in detail in this letter and its attachments* is the Procter & Gamble Customer Pick-up Allowance Plan (Plan) for payment of an allowance to customers choosing to pick up merchandise at plant locations rather than receiving shipment under the Company's uniform delivered prices at the customer's warehouse location.

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Careful consideration has been given to designing the Plan in accordance with the Company's understanding of its obligations under the Robinson-Patman Act and Section 8 of the Motor Carrier Act of 1980. The Company does not presently permit customers to pick up orders at point of shipment.

Review of this Plan by the Federal Trade Commission and an opinion regarding its lawfulness is requested in connection with any issues it may present regarding the applicability of the Robinson-Patman Act, Section 8 of the Motor Carrier Act of 1980, and any other statute enforced by the Commission.

1. *General Description of the Procter & Gamble Customer Pick-Up Allowance Plan.*

The Plan presented for consideration by the Commission is limited to certain selected brands in the Bar Soap & Household Cleaning Products Division (BS&HCP). If the test of this Plan is sucessful, consideration would be given to expansion of the Plan to other brands and shipping locations.

The test Plan would apply to 17 separate sizes of four brands: Downy, Biz, Comet, and Bounce. These items represent about 68% of total case volume in the BS&HCP Division which markets nationally 45 separately priced items. Only the designated brand(s) would be available for pick-up at six producing plant locations for these brands around the country. For example, only Downy and Biz would be available at Lima.

The Plan requires customer pick-up of orders in unit-load, full truckload quantities of the brand(s) produced at designated locations. The customer pick-up allowance will be reflected in the customer's invoice as a deduction from the uniform delivered carload price. The formula for calculating the amount of the transportation allowance is developed from two basic cost elements of motor carrier operation: (1) driver labor for loading and unloading at $16.25 per hour (current national Teamsters' wages and fringes); and (2) operating cost of $1.00 per mile (current national average to run a tractor and trailer 100,000 miles per year). These two factors are computed over a distance between the Company's designated shipping point for the customer and the customer's designated destination, converted to a rate per hundred pounds, and paid to the customer based on the total weight purchased.

Exhibit A* to this letter is a copy of the contract that will be used

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with each customer desiring to participate in the Plan. This contract incorporates the Operating Guidelines which a customer must observe in the areas of order placement, appointment scheduling, and dock disciplines. These Operating Guidelines are included as Attachment A* to Exhibit A.

2 . *Pick-Up Allowance Calculation Formula.*

The formula for calculating how much each customer will be paid for picking up its order will have uniform application regardless of the brand involved or the shipping location. The amount of the allowance will vary depending on the distance between the Company's shipping point and the customer's designated destination. In congested markets where plant shipping areas converge for the same brand, the customer can elect either shipping point to make a pick-up. In other markets, the allowance will be calculated solely on the basis of the Company's designated shipping point for the customer even though the customer may elect to pick-up at a more distant location.

The driver labor and operating expense factors in the formula are two elements of cost making up a common carrier or contract freight rate and current comparisons show that these factors represent about two-thirds of such rates as would be paid by the Company if the order were delivered to the customer. These two basic cost elements of motor carrier operation can be more fully described as follows:

a) *Driver labor for loading and unloading:* Four hours are allowed at the current national Teamsters' wages and fringes rate of $16.25 per hour ($65.00). This reflects the most prevalent standard in the food and grocery industry. The four hours allowed for loading and unloading parallel the hours allowed under MC-88, the national uniform detention rule.

b) *Operating expenses of $1.00 per mile:* This rate per mile is designed to cover motor carrier operating costs. It is based on the national average cost to run a tractor and trailer 100,000 miles per year, and covers the following factors: driver, cost of equipment, fuel, tires, repair and maintenance, licensing, insurance, interest, and road use taxes. Support for determining this figure comes from a variety of sources including trucking industry cost surveys. We have included a recent survey by Hertz published in *Traffic*

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World, May 19, 1980 as Exhibit B*.

This operating expense classification represents two-thirds of for-hire carrier rates on average since it does *not* include amounts for profit or costs of sales and administration that would be included in a straight for-hire situation.

Pick-up loads transported less than 75 miles will earn the minimum allowance of $140.00 regardless of load weight or distance. This minimum allowance level recognizes the higher fixed cost involved in driver time for metropolitan traffic and tends to parallel the increase in local freight rates by for-hire carriers. This minimum for local pick-up is still within the range of two-thirds of the Company's average cost of local delivery.

The two factors in our allowance calculation formula will escalate over time and the Company would plan to review these factors periodically and make changes as needed.

3 . *The Plan is designed to maintain Procter & Gamble's efficient distribution system while meeting the intent of Congress to create better efficiency in transportation.*

Procter & Gamble has developed a delivery system in the BS&HCP Division which is tailored to volume, plant number and locations, and the product replenishment requirements of our customers. The resulting distribution pattern concentrates shipment of over 95% of this Division's volume from strategically located production points directly to customers. In addition, almost 90% of our customer shipment volume is in truckload or carload quantities. Therefore, our plants handle huge volumes with what we consider to be unusually high shipping efficiencies. We need to be careful not to significantly disturb these shipping efficiencies, or the result would be higher costs which in turn would tend to increase base prices and, thus, lead to higher consumer prices on our products.

The specific purpose of Section 8 of the Motor Carrier Act of 1980 is to permit and encourage increased transportation efficiencies and cost savings in the marketing and delivering of food and grocery products, with the ultimate beneficiary of such cost savings being the American consumer. True cost savings must be realized within the transportation/distribution system to generate true consumer benefits.

Support for customer pick-up focuses on a reduction of large trucks

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running empty on return trips to home base following full load delivery of products to retail outlets. By picking up a full load of supplier product for the return trip, those trucks are literally replacing another truck which normally would carry that load. This full load replacement transportation maximizes fuel and cost savings within the total system.

Limiting pick-up to producing plant locations is another factor which importantly protects the efficiencies that are already in place at Procter & Gamble. Many other large food and grocery suppliers depend upon a broad network of warehouse distribution centers from which customer shipments are made. These multiple commodity distribution warehouse operations, after receiving product from several producing locations, store, handle, and assemble customer orders for shipment to final destinations. Obviously, this more complex system better suits the marketing objectives and/or requirements of many suppliers, but adds several elements of cost to total delivery expense which this Company has successfully avoided.

Other BS&HCP items will be available for delivery by the Company from a producing plant warehouse that are not designated for customer pick-up under the Plan. These are either lower volume items produced at that pick-up location or they have been shipped from other producing plants for filling combined full carload or smaller orders when a customer's order includes those items. The lower volume items made at the pick-up location are not included because of the test nature of the Plan. On items shipped from other producing plants delivery and other costs have already been incurred. Such items do not qualify under the Plan because they do not maximize the full economies which otherwise exists when a customer picks-up a full truckload of an item that has been made at the producing plant location.

4 . *The Plan complies with the intent and spirit of the Motor Carrier Act of 1980.*

a) *Allowance payments would not "exceed seller's cost of delivery".* As indicated above, the pick-up allowance calculation formula would return to the customer about two-thirds of the Company's actual delivery expense on average. Section 8 of the Motor Carrier Act of 1980 permits payment of a customer pick-up allowance which ". . . does not exceed the actual cost to the seller of delivery to such customer . . .." The reasonable interpretation of this requirement is that the actual cost ceiling is the amount a seller would pay to a carrier as its actual shipping rate. Thus, a

special negotiated rate would apply, if available, rather than a published or list rate.

Examination of allowances under our formula against the actual cost to the Company indicates that in every instance the Company's cost of delivery would exceed the amount of the allowance. For purposes of illustration, we have included Exhibit C,* which is a diagram and chart showing the effect of the customer pick-up plan in the Illinois market in terms of anticipated customer participation and the customer pick-up allowance rates under the Plan versus cost of delivery by the Company.

Since the proposed Plan is based on full truckload orders the issue of incremental or marginal cost of a certain single order contributing to a combined truckload rate is not a consideration in this Plan. We hasten to point out that even though the issue is not presented here, any interpretation of the actual cost standard of Section 8 would require application of marginal or incremental costs would, in our view, be unrealistic and would result in discriminatory allowance payments among competing purchasers in conflict with other language in Section 8.

b) *All retailers will have an opportunity to benefit from the savings represented by the allowances paid under the Procter & Gamble Customer Pick-Up Plan.* The food and grocery distribution system operates primarily on a two step movement of goods pattern:

(1) *Shipment of full loads* of merchandise (70% by truck, 30% by rail) from individual manufacturers to customer distribution centers; and
(2) Delivery of full or partial truckloads in mixed assortments from the grocery distribution centers to retail outlets.

Numerically, about *1,000* manufacturers supply approximately *10,000* separate items to *2,500* food and grocery warehouse distribution centers, for combined deliveries to about *185,000* retail outlets. The warehouse operations, whether chains, cooperative group wholesaler, voluntary group wholesaler, or unaffiliated wholesaler, buy in truckload or carload quantities from manufacturers to meet normal turnover demand and/or to secure the optimum price available. In the test phase of the Company's Plan it is estimated that 127 warehouse customers will participate out of a total of over

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1,500 who purchase BS&HCP items. These warehouse accounts in turn will distribute brands picked-up under the Plan to thousands of individual retail stores.

A full truckload move by any of the above types of warehouse accounts provides the opportunity for pick-up cost savings to all types and sizes of retail outlets serviced by them. This has been confirmed by spokesmen for the largest wholesale and retail associations. Exhibit D* contains excerpts of testimony presented at hearings on various legislative proposals authorizing payment of customer pick-up allowances which support and amplify this point.

Exhibit E* is a diagram prepared by the National American Wholesale Grocers Association illustrating the movement of products from manufacturer through warehouse distribution centers to retail outlets.

Finally, Section 8 expresses in Subsection (b) the "... sense of Congress that any savings accruing to a customer by reason of compensation permitted by Subsection (a) of this Section should be passed on to the ultimate consumer". Thus, Section 8 itself makes retailers who purchase from wholesalers a necessary link in the chain to pass on any savings recognized by that wholesaler through receipt of a customer pick-up allowance under the proposed Plan. The obligation to see that these benefits are in fact, passed along to the retailer and ultimate consumer has been assigned to the ICC under the Motor Carrier Act.

c) *The allowance would apply to "food and grocery" products.* The brands described above are two fabric softeners, a laundry presoak and a hard surface cleanser. These are generally classed as cleaning products which are normally sold in grocery stores. Webster's New Collegiate Dictionary defines "groceries" as "commodities sold by a grocer". It is our opinion that any Procter & Gamble consumer brand sold in grocery stores would be within the term "food and grocery products" as used in Section 8. We believe this should be the case even though some items, like Comet, may also be resold in small volume by a jobber customer for institutional use.

d) *The plan would be "non-discriminatory" in application and effect.* As indicated above and in Exhibit C,* the allowance formula would be applied uniformly to any customer willing to participate in the Procter & Gamble Plan. While individual customer

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allowance amounts will vary on the basis of distance as a result of uniform application of the formula, similar differences also exist in the cost which the Company must pay to a carrier under similar circumstances. The chart in Exhibit C* will clearly illustrate this point.

The Procter & Gamble Customer Pick-Up Plan will be broadly announced to the trade with appropriate publicity and notices on price lists which are sent to customers.

The Plan requires a customer to declare its destination for the order it is picking up. This is the basis on which the customer's allowance will be calculated. The opportunity does exist for customers to abuse the Plan by delivering the product to stores or warehouses which are closer to the shipping point than the location designated by the customer. It is the Company's intention to protect against this possibility by reserving the right to inspect a customer's shipment records to verify their delivery destination on orders picked up by a customer. This would be done in cases where suspicious circumstances exist or as part of a periodic spot check procedure.

Any allowance overpayment discovered by the Company would result in an immediate bill back to the customer to recover this amount. Repeated abuses of the requirements of the Plan could result in a 12 month suspension from the Plan after which the customer could be automatically reinstated subject to continued observance of the requirements of the Plan. All sanctions would be applied uniformly and objectively.

It is respectfully requested that the proposed course of action as described receive the consideration of the Commission and that an Advisory Opinion issue.

Very truly yours,

/s/ David G. Hemminger

Senior Counsel, Trade Regulation

Second Letter of Request

March 18, 1981

Dear Mr. Tasker:

The purpose of this letter is to address two specific questions that

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you raised regarding the Procter & Gamble Customer Pick-up Allowance Plan that was described in our Request for an Advisory Opinion of September 2, 1980. Your first question related to the requirement of the Plan for a truckload order and how this requirement might affect customers purchasing in less than truckload quantities.

As indicated in our Request, 90% of the total volume of BS&HCP products is currently shipped in truckload quantities. The 10% volume in less than truckload quantities results from a variety of reasons:

1. The Company offers the sale of BS&HCP brands for direct delivery to creditworthy customers for a minimum order size of 25 cases. There are some customers who purchase in this minimum.
2. Less than truckload orders occasionally are the result of our being unable to fulfill shipment against an original truckload order. The customer receives the truckload price under these conditions.

Small LTL order shipments are considerably more costly to the Company on a per case basis than truckload orders and much of this cost is not recovered through the higher price charges for small orders under our quantity discount structure. However, it is estimated that all such orders were shipped to only 2% of approximately 160,000 stores carrying BS&HCP brands that are not supplied by a chain warehouse. About half of the LTL shipments were to chain stores like K-Mart who had chosen to by-pass their central warehouse facilities by electing direct store delivery at a higher price under the Company's quantity discount structure. The other 98% of such stores are supplied by wholesale warehouse accounts.

Some chain retailers and wholesale accounts who warehouse also order on an LTL basis to their warehouse. While this may represent their optimum inventory level, they could well have the capacity and the financial resources to purchase in truckload quantities, especially if a customer pickup allowance opportunity were available.

As stated in the Request, Procter & Gamble must balance any arrangement to accomodate customer pick-up with the total efficiencies inherent in the Procter & Gamble distribution system. To allow the pick-up of LTL orders would create serious disruptions in the efficient, large-scale distribution system at our producing plants which would inevitably result in overall higher costs. Other suppliers have announced customer pick-up allowance programs since the enactment of the Motor Carrier Act of 1980. Most of the plans which have reached our attention are in fact limited to truckload orders as well.

As stated in Section 4(b) of the Procter & Gamble Request, it is an-

ticipated that the benefits of the customer pick-up allowance plan will accrue to small resellers through wholesalers as required by Section 8(b) of the Act and as indicated by the testimony before the Select Committee on Small Businesses of the United States Senate contained in Exhibit D* of our Request. Any retailer choosing to purchase through a wholesaler to obtain the benefit of customer pick-up savings gained by the wholesaler, rather than buy direct from Procter & Gamble, may do so. There is no requirement that obligates a customer to continue to purchase from Procter & Gamble on a direct basis. In this regard, we believe the Plan is non-discriminatory, applies uniformly and thus is fully within the requirements of Section 8 of the Motor Carrier Act of 1980.

Your second request was to clarify the availability of the Customer Pick-up Allowance Plan to *all resellers* of the BS&HCP brands included in the Plan. It is clearly the intent of Procter & Gamble to extend its Plan to any reseller at the wholesale or retail level regardless of trade classification.

I request that this letter be accorded temporary confidential status, and that it be considered exempt from disclosure under the Freedom of Information Act, until the Commission has issued its opinion in response to Procter & Gamble's Request. This request is made for the reason described in Mr. McHenry's letter to Mr. Carol Thomas, Secretary, of September 8, 1980.

If you have any questions regarding the above, please feel free to call me at any time.

Very truly yours,

/s/ David G. Hemminger

Senior Counsel, Trade Regulation

Third Letter of Request

April 16, 1981

Dear Mr. Pfunder:

This letter will confirm our telephone conversation yesterday at which time I advised you of a minor change in the Procter & Gamble Request for an Advisory Opinion. That change involves the deletion

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of the Baltimore Plant as a pickup point for Downy fabric softener. This product will be supplied in full truckload quantities solely from the Lima, Ohio plant for destinations in the eastern United States due to cost considerations.

I have enclosed those pages which are part of the Request* that will show a deletion of the Baltimore Plant as a pickup location. Please note that there have also been some minor wording changes in the Operating Guidelines (Exhibit A,* Attachment A*) which have been made for purposes of clarification. These changes have been highlighted in the attached document.*

It is our judgment that the deletion of the Baltimore Plant as a pickup point and the other word changes in the Operating Guidelines would not affect the substantive legal evaluation of the Company's Request, nor should they contribute to any further delay in action by the Federal Trade Commission upon the Request. Should you have any questions please call me.

Very truly yours,

/s/ David G. Hemminger

Senior Counsel, Trade Regulation

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Issued guidance in defining and interpreting key terms of Robinson-Patman Act and Motor Carrier Act of 1980. [*813 7002, Grocery Manufacturers of America, Inc.*]

July 29, 1981

Dear Mr. Brown:

This is in response to your request of October 8, 1980, on behalf of the Grocery Manufacturers of America (GMA), for an Advisory Opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. §§ 1.1-1.4 (1980). The Commission has carefully reviewed your request and has concluded that, while you have not provided sufficient information to permit a response in detail to each and every one of your detailed factual situations, some general and, it is hoped, useful guidance in responding to your request is appropriate.

All nine of the factual situations you posit relate to the recently-enacted legislation, Section 8(a) "(a)" of the Motor Carrier Act of 1980, Pub. Law 96-296, 94 Stat. 798 (July 1, 1980) ("Section 8"). Section 8 permits "a seller of food and grocery products using a uniform zone delivered pricing system to compensate a customer who picks up purchased food and grocery products at the shipping point of the seller if such compensation is available to all customers of the seller on a nondiscriminatory basis and does not exceed the actual cost of delivery to such customer." The Commission believes it is appropriate to offer advice in connection with the questions of law that may arise under Section 8, because of that statute's relationship, as set forth in its legislative history, to the Clayton Act as amended by the Robinson-Patman Act of 1936, 15 U.S.C. 13 (1970). The latter statute is enforced by this Commission. To the extent that Section 8 creates a limited exemption from the Clayton Act or, as a practical matter, may provide a new defense to a claim of violation of that statute when its terms are met, the Commission believes that it has authority to interpret Section 8 in light of the historic principles embodied in the Robinson-Patman Act, and especially those precedents that are not inconsistent with the purposes of Section 8.

Your nine factual situations address, in essence, three issues under Section 8. The first has to do with the meaning of the phrase "actual cost" under the statute and the related second issue addresses Section 8's use of the phrase "nondiscriminatory basis." The third issue relates to the breadth of the exemption or defense available under Section 8 by focusing on the identity of "sellers of food and grocery

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products" who may offer to compensate customers under Section 8; the identity of products, in connection with the sale of which compensation may be offered under Section 8; and the identity of customers who are eligible to receive compensation under the statute.

Turning first to your six factual situations relating to the meaning of "actual cost", the Commission is of the view that it cannot advise with any precision what the exact actual cost would be under these situations without engaging in an extensive collateral inquiry beyond the scope of the Commission's advisory opinion rules. The determination of the precise actual cost in each instance would depend upon the facts of each situation.

It appears, however, that at least one common principle would apply to that determination in each situation. The determination of a seller's "actual costs" should be based on the actual costs the particular seller would have incurred had that seller performed his obligation to deliver under the uniform delivered price to a particular buyer. If a common carrier would have provided the service, the published common carrier rate should be used. If a contract carrier would have performed the service, the contract rate should be used. If the seller leases trucks or uses its own trucks, it should know its actual costs and those should be used. If the seller ships by rail, rather than by truck, under its uniform delivered price system, the rail rates should be used, even if those rail rates do not result in full compensation to a customer using a truck to pick up. Section 8 and its legislative history are clear that the critical reference is to the seller's costs, not the buyer's. Moreover, this approach is fully consistent with the approach required to be taken when questions of "actual cost" arise under the Robinson-Patman Act.

"Actual costs" need to be determined only for one purpose under Section 8: to establish a "ceiling" amount, above which compensation may not be granted in compliance with Section 8. It should be kept firmly in mind that compensation, according to Section 8, need not equal those actual costs. The statute only requires that compensation "not exceed" such costs.[1] This concept is also fully consistent with the analysis of cost-based discounts, rebates and other forms of price reductions under the Robinson-Patman Act.

In addition to "not exceeding" a seller's actual costs, compensation under Section 8 must be "available to all customers on a nondiscriminatory basis." Your factual inquiries also touch on this issue.

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[1] The seller presumably can use indirect costs (*see* your factual inquiry no. 2) as well as direct costs to determine the cost ceiling, so long as the allowances based on the ceiling are offered and applied on a nondiscriminatory basis, as discussed below. The Commission would add, however, that the use of such costs should be approached with caution, inasmuch as they may be difficult to allocate on a nondiscriminatory basis.

The Commission understands this proviso to mean that similarly situated customers — that is, customers located the same distance from a seller's shipping point — should have the opportunity to, and be entitled to, receive the same dollar value of compensation for picking up identical quantities of food and grocery products. Thus, it appears generally correct that the amount of compensation for identical purchases by similarly situated customers should vary only by the distance traveled to deliver.

Given these understandings, the Commission believes it is appropriate to advise you with respect to your factual inquiries addressing the computation of "actual" cost in less than truckload (LTL) shipping situations. The Commission believes that compensation to customers on an LTL basis, if such compensation is reflective of the seller's usual "actual costs," is permitted under Section 8. The Commission notes, however, that determining the actual cost ceiling in LTL circumstances appears to be complicated, as evidenced by your factual situation no. 1. In addition, it would seem that, depending upon how "actual" costs are determined in the LTL context, similarly situated customers conceivably could be entitled to receive different dollar value compensation. This result would appear to be inconsistent with Section 8's requirement that compensation be available on a non-discriminatory basis, and sellers should proceed with caution in this area to avoid stepping outside of Section 8.[2]

Your remaining factual inquiries address the breadth of Section 8. The statute only applies to food and grocery products sold under a uniform delivered pricing system. The Commission believes that food and grocery products should be defined as products sold primarily in grocery stores. The Commission also believes that in a situation where the seller sells both "food and grocery products" and other types of goods, Section 8 permits the seller to offer compensation with respect to those food and grocery products but not with respect to other types of goods it may sell. If a seller of food and grocery products offers compensation under Section 8, however, the seller must so offer to all customers who may purchase those products, regardless of the type of retail outlet — grocery store, drug store, etc. operated or supplied by the customer. Section 8 does not contain any language limiting or modifying the word "customer".[3]

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[2] In this regard it should be noted that it would appear that a seller of food and grocery products may limit the opportunity to receive compensation by setting minimum quantity purchases without losing the Section 8 exemption if such minimum quantities do not make the allowances unavailable to an identifiable class of purchasers.

[3] The definition of "customer" in this context is consistent with established principles of Robinson-Patman law enforcement. *See, e.g.*, the FTC's Guides for Advertising Allowances and Other Forms of Merchandising Payments and Services, Guide 3, which defines customer as "someone who buys for resale directly from the seller, the seller's agent, or broker; and, in addition, a customer is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller." 16 C.F.R. § 240.3 (1980).

The Commission has tried to bring to bear, in providing this limited advice, its accumulated expertise in matters having to do with direct and indirect forms of price discrimination under the laws which it administers. It is hoped that you and the membership of GMA will find this advice of some use in implementing Section 8 of the Motor Carrier Act of 1980.

By direction of the Commission.

SEPARATE STATEMENT OF ACTING CHAIRMAN CLANTON

While I am in agreement with the Commission's advisory opinion letter to the Grocery Manufacturers of America in most respects, there is one point of departure on which I believe that the majority's opinion should give additional guidance. The majority's letter defines "similarly situated customers" to include only those customers who are located equal geographical distances from the shipper's dock. While it is correct under a single-mode, mileage-based backhaul allowance formula that, in order to meet the non-discrimination criterion of Section 8, the amount of compensation for identical purchases by similarly situated customers should vary only by the distance from the seller's dock, I believe that our advice should go a step beyond this.

I would take this opportunity to acknowledge the possibility, without attempting to define the circumstances, that customers might be "similarly situated" in cost-related ways other than mere geographical distance and, conversely, that between equidistant customers clear cost differences based on actual experience may be established. Such cost-related circumstances might involve the historic use of different or multiple modes of transportation to different customers, so that a formula measuring only mileage from a seller's dock using single-mode rates may not truly reflect all the circumstances under which customer comparability could be achieved. In short, I believe the majority's letter can be read as saying that a single-mode, mileage-based backhaul allowance formula is the *only* system that a seller can use which will comply with the terms of Section 8, and I would disagree with such a narrow interpretation.

Letter of Request

October 8, 1981

Dear Secretary Thomas:

This letter requests an advisory opinion pursuant to FTC Rules of

Practice and Procedures § 1.1 on the meaning of (A) the terms "actual cost" and the interrelated term "nondiscriminatory"; and (B) the term "food and grocery products", as contained in Section 8(a) of the Motor Carrier Act of 1980, Pub. Law 96-296, as applied to the factual situations described below.

Grocery Manufacturers of America (GMA) is a trade association composed of the leading manufacturers of food and grocery products sold in retail outlets throughout the United States.

As a result of numerous inquiries from our members, we are aware of their deep concern about the definition of the above-mentioned terms and the requirements manufacturers must meet in order to lawfully grant the pickup allowances authorized by Section 8. None of the terms is defined in the section and the legislative history offers, at best, only limited guidance as to their application.

The situation remains unclarified even though Section 8 became law on July 1, 1980. In the absence of clarification, many manufacturers are reluctant to implement the section because deviation from its requirements might well expose them to Robinson-Patman liability, especially in the form of treble damage suits.

Accordingly, GMA seeks, on behalf of its members, authoritative advice from the Commission on the factual situations which are described below and which have grown out of the inquiries of our members. Such advice would not only materially assist the industry in complying with laws administered by the Commisssion, but would also assist the Commission by minimizing the number of requests for advisory opinions. The public interest would also be served by early resolution of these substantial questions for which there are no Commission or judicial precedents.

A. *"Actual Cost" and "Non-Discriminatory"*

In each of the factual situations described below, food and grocery products are involved, and the seller utilizes a valid uniform zone delivered price system. As can be seen, all of the situations deal with the definition of "actual cost" and numbers 1 and 3 also involve the term "nondiscriminatory".

1. If, using one truck, it costs seller $1 per case to deliver LTL shipments to buyers A, B, and C; $.80 per case to deliver to B and C when A picks up, and $.75 per case to deliver to C when A and B pick up, what is seller's "actual cost" in each case?

Comment: Both committee reports would seem to suggest that

$.20 per case is the actual cost when A picks up, i.e., $1 minus $.80. Beyond that, however, the situation is far from clear. Carrying these examples to their logical conclusion, B would then get an allowance of $.05 per case and C, $.75 per case. If the three buyers are roughly equidistant from the seller, as they could easily be, these differences, based on the order in which the buyer elected to switch from delivery to pickup, fly in the face of fairness to say nothing of the requirement in Section 8 that such allowances be made available on a non-discriminatory basis. In this case, it would appear that the only course for the seller to avoid discrimination after the first buyer picks up is to offer an allowance of $.05 per case to each buyer, even though such a result could be questioned in view of the purpose of Section 8.

2. A seller calculates, using its own trucks, the operating costs for a delivery to be $10. Must he also attempt to compute allocable overhead, joint, and fixed costs in determining actual cost?

Comment: Seller's books should yield operating costs, but computing and allocating other types of costs is an administrative and bookkeeping nightmare fraught with opportunities for anti-competitive behavior and endless conflicts among buyers, sellers, competitors, and the government.[1] The Commission would certainly be forced into issuing detailed guidelines if non-operational costs are to be recognized, and even then, the conflict would go on.

3. Seller A, using its own trucks, bases its determination of "actual cost" on common carrier rates for comparable deliveries. Seller B uses a mix of its own trucks and regulated carriers. How would Seller B determine actual cost?

Comment: In the first case, use of common carrier rates would seem precluded. As the House Interstate and Foreign Commerce Committee report states: "actual cost" means "the cost which would have been incurred if delivery to the customer had been made by the seller in the ordinary course of its business and by means, modes, and under conditions that would have been elected by the seller"[2] (See also Senator Long's statement at the time of final passage).[3] As the foregoing quote also suggests, the answer in the second case would seem to be dictated by the particular circumstances of each situa-

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[1] See statement by Alfred F. Dougherty, Jr., former Director, Bureau of Competition, Federal Trade Commission, in hearings before the Senate Select Committee on Small Business on "Customer Pickup Proposals and Their Impact on Small Business and the Robinson-Patman Act." April 3, 1980, p. 26.

[2] H.Rept. 96-1069, at 20 (June 3, 1980).

[3] 126 Cong.Rec. § 7686 (June 20, 1980).

tion—the mode that had been used to make deliveries to the buyer in the past, or to other buyers similarly situated.

4. A seller using only regulated carriers can have a product delivered to a buyer by carrier A for $10 and by carrier B for $11. What is seller's "actual cost"?

Comment: The legislative history (see quote from committee report above) suggests that it would be the rate of the carrier the seller is, in fact, using. If neither carrier is being used, $10 would seem to be the proper answer.

5. Seller A makes deliveries by regulated carriers. May he permit a buyer to pick up a truckload order in two half truckload lots and receive a pickup allowance based on the higher LTL rate?

Comment: Again, the legislative history quoted above would seem to preclude such a practice.

6. A seller delivers most of its food and grocery products by rail. In such a case, would the answers to questions 1 and 5 be altered?

Comment: As long as the rail deliveries are made under a uniform delivered pricing system, it would appear that the result should be the same. There is nothing in the language of Section 8 limiting its application to truck deliveries by the seller, and the excerpt from the committee reports quoted in the comment under item 3, above, shows clear Congressional intent that actual cost be measured on the basis of delivery modes the seller chooses.

B. "*Food and Grocery Products*"

In each of the factual situations described below, the seller utilizes a valid uniform zone delivered price system and would make actual cost allowances available on a non-discriminatory basis.

1. A seller of food products has been approached by a large drug store chain desirous of picking up certain food products at the seller's dock and receiving an actual cost allowance pursuant to Section 8. The seller intends to offer the allowance.

Comment: We think the seller appears to be on sound legal ground. Neither the section nor the legislative history evidences any require-

ment for the customer to be engaged in the food or grocery industry; the "food and grocery products" limitation in the section applies only to the seller of products.

2. Seller makes toys and food. A supermarket chain desires to pick up several lines of toys and receive an actual cost allowance under Section 8. Seller is uncertain whether or not to grant the allowance.

Comment: Toys would not normally be regarded as a grocery product. Yet, if they are sold in retail outlets whose principal business is selling food, i.e., a grocery store, then they may, by virtue of this fact, be considered as grocery products.

3. Seller, which manufactures prescription and OTC brand name drugs, has been approached by a retail drug chain which desires to buy the drugs at seller's dock and receive a Section 8 allowance. Seller is uncertain whether it can legally grant the allowance.

Comment: This situation goes beyond 1 and 2 above, in that neither the business of the buyer or seller is principally related to food, yet such drugs are widely sold in outlets such as supermarkets where their presence might well qualify them to be treated as grocery products.

Please feel free to call upon us for further information or if we can help you in any other way to facilitate responses to these questions.

Sincerely,

/s/ Stephen A. Brown

Vice President and General Counsel

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